

**“ONCE MORE UNTO THE BREACH:” THE
WAR POWERS RESOLUTION REVISITED**

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LECTURE I.

The War Powers Resolution was enacted over President Nixon's veto in 1973, as the twin dramas of Vietnam and Watergate were approaching their climax in the President's resignation nearly a year later. The sponsors of the statute told the American people it would protect the nation from “another Vietnam” and piously restore the constitutional balance the Founding Fathers intended between Congress and the President with regard to the use of the national force. That balance had been disturbed, the supporters of the Resolution claimed, by a series of Presidents since McKinley who had stolen the war-making powers entrusted to Congress by the Constitution, and thereby made Congress the impotent slave of an Imperial Presidency. Once we return to the true constitutional faith, these Solons said, the peace, security, and prosperity of the United States and its allies would be assured.

The critics of the statute were equally apocalyptic. The Resolution,

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My purpose in this paper is to reconsider and supplement my earlier writings on the War Powers Act and bring them up to date. Those writings include: *War, Foreign Affairs and the Constitution*, 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2007-2013 (1986); *Commander-in-Chief*, 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 316, 317 (1986); *Great Cases Make Bad Law*, 50 *TEX. L. REV.* 833 (1972); *Response to Professor Henkin*, 61 *VA L. REV.* 797 (1975); *Learning Lessons from Vietnam*, *CONGRESS, THE PRESIDENT, AND FOREIGN POLICY* 89 (1984); *War Powers: Hearings Before the Subcomm. on Nat'l. Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93rd Cong., 1st Sess 395 (1973) (statement by Eugene V. Rostow). The present article rescues some pages of my testimony in the 1973 War Powers Hearings from the unindexed limbo of such documents.

they argued, rested on a mistaken understanding of the intentions of the Founding Fathers and the course of constitutional history. The proponents of the Resolution were guilty of a cruel and hypocritical deception in promising the American people immunity from "another Vietnam." Not even an Act of Congress can guarantee that our wars will always be conducted wisely and effectively, and won. In any event, they pointed out with some asperity, the Vietnam War had been authorized not only by the decisions of four Presidents, but by two treaties and repeated Congressional acts and joint resolutions which amply satisfied the procedural requirements of the new statute. Moreover, the War Powers Resolution could not "restore" the balance of the Constitution; that balance had never been disturbed. The foreign affairs powers, including the war powers of the United States, had been exercised in much the same way between the time of Washington and John Adams and that of Franklin Roosevelt, Truman, and Lyndon Johnson. If enforced, the War Powers Resolution would accomplish the most revolutionary constitutional change in American history. It would deprive the President of his capacity for prompt and decisive action which has been critical to his effectiveness both in the conduct of foreign relations and in the management of crises. These powers are inherent in the Presidency and necessary to the security of the nation—more necessary today than ever before. Actually enforcing the War Powers Resolution would convert the strong, autonomous President which is one of the great achievements of the Constitution into a mere lackey of an omnipotent Congress. Such action would repudiate Hamilton's theory of the Presidency which has dominated judicial decisions and constitutional practice in the domain of foreign affairs since 1789, and for the first time embrace what Corwin scornfully called the "ultra-Whig" view of the office.¹ If the War Powers Resolution had been in effect, Lincoln could not have saved the Union, Franklin Roosevelt could not have taken the early steps which made it possible in the end to defeat Hitler, and Kennedy could not have conducted the Cuban Missile crisis successfully. Thus, in the eyes of Hamiltonians, the War Powers Resolution would restore the Articles of Confederation as our norm for handling the foreign affairs of the nation, and leave the United States drifting helplessly in stormy seas, naked before its enemies. In their view, the ultra-Whigs have revived a familiar and beloved constitutional controversy in order to avoid the disagreeable fact that changes in the magnetic field of world politics since 1789 have imposed novel and dangerous tasks on the people and government of the United States.

With the benefit of hindsight, these two lectures attempt to review the continuing debate about the War Powers Resolution against the background of international law and politics and the nation's experience in con-

1. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957* at 17 (4th ed. 1957). See also CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 126-207 (1917).

ducting its foreign relations under the Constitution of 1787. The first lecture examines the controversy in the light of constitutional theory and early practice; the second takes up the War Powers Resolution and its reception.

I

For purposes of international law, the United States is a unitary, not a federal state. Internationally, the American states are provinces, devoid of "sovereignty." Since we prevailed in the Revolutionary War, the United States is considered legally to have come into being as a full fledged member of the family of nations with the Declaration of Independence, vested as of that date with all the powers, rights, immunities, and privileges acknowledged by international law as the prerogative of widely recognized states. Correspondingly, the United States is liable to other states for the performance of the duties imposed upon all states by international law. In the "great external realm" of foreign affairs, the United States can do whatever other states do—that is, whatever it deems necessary and reasonable to assure its safety and well-being in international society.

The Constitution does not purport to "grant" international powers to the United States any more than it purports to create the United States. On the contrary, as is natural in a document reorganizing the institutions of a functioning government for the second time more than a decade after its creation, it treats the United States as an existing and on-going political entity. The Constitution is written in the name of "the people of the United States,"² and notes as obviously valid the treaties made under the authority of the United States between 1776 and 1789.³ Thus the international powers of the United States are conferred and defined by international law. Internationally, the government of the United States possesses all the powers possessed by any other state under international law, including the sovereign power to violate international law. The Constitution commits these powers to the political discretion of Congress and the President in accordance with the principle of functional necessity. If Congress or the President should decide to use the national force in violation of international law, courts and citizens are bound thereby, as they are bound by other official decisions with in the discretion of the political branches of government.⁴ The division of the foreign affairs and war powers between Congress and the President reflects the grand Design of the American polity, to recall

2. U.S. CONST. preamble.

3. U.S. CONST. art. VI, cl. 2.

4. *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1972); *Cook v. United States*, 288 U.S. 102 (1933); *The Chinese Exclusion Cases*, 130 U.S. 581 (1899); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. 580 (1884); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 15-16 (1972).

the favorite major premise of John Marshall's constitutional opinions.⁵ In this instance, the great purpose of the Constitution is to fulfill the twin objectives of executive effectiveness and democratic responsibility: a strong, energetic President and a strong, energetic Congress. The international powers of the nation which are legislative in character, with some exceptions, are Congressional, and those which are executive in character, with some exceptions, are Presidential. The Senate must give its advice and consent to the appointment of high officials and the ratification of treaties, and only Congress can "declare" war.

The President created by the Constitution was in no sense to be a Prime Minister. No member of Congress can serve in the executive branch.⁶ And the President is elected not by Congress but by an independent national constituency for a different term. As Professor Corwin wrote,

[t]he fact is that what the Framers had in mind was not the cabinet system, as yet nonexistent even in Great Britain, but the 'balanced constitution' of Locke, Montesquieu, and Blackstone, which carried with it the idea of a *divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative'*. Sir Henry Maine's dictum that 'the American Constitution is the British Constitution with the monarchy left out' is, from the point of view of 1789, almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also of course the hereditary feature.⁷
[italics in original]

There is comfort in reciting these familiar words, and it is intellectually necessary to do so, but they are no more than a starting point for analysis, and a fairly boggy starting point at that. The boundary between the legislative and the executive power is not always easy to draw in the domestic governance of the United States, although with regard to some problems one can in desperation invoke Justice Potter Stewart's celebrated comment about "hard-core" pornography:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this

5. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 17 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

6. U.S. CONST. art I § 6, cl. 2.

7. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 14-15 (4th ed. 1957).

case is not that.⁸

With regard to foreign affairs, including the respective powers of the President and Congress over the use of force, the normal difficulties of constitutional construction are complicated by two special factors: (1) modern American citizens and lawyers are less familiar with international law than their predecessors in the late eighteenth and early nineteenth centuries; and (2) the turbulence of the world since 1914 has required a far more active American foreign policy than was the case for most of the nineteenth century. Since 1914, foreign affairs have been a much more constant preoccupation of American domestic politics and a much more important factor in the perennial tug of war between Congress and the President than has been the case since the Presidencies of George Washington and John Adams. It is no wonder that John Quincy Adams once remarked that the boundary between Presidential and Congressional power in the field of foreign affairs is as yet undetermined, and perhaps never could be defined.⁹

A great deal of the heat in the debate over the War Powers Resolution derives from a popular and sometimes even professional misunderstanding of the clause in the Constitution which specifies that Congress has the power "to declare war."¹⁰ The phrase has acquired a mystic denotation in the vocabulary of American politics quite unjustified by its meaning and history. Despite nearly two hundred years of experience to the contrary, people cling to the view that there is something improper, perhaps illegal or even a bit dictatorial in hostilities authorized by the President alone, or by the President and Congress acting together but without benefit of a Joint Resolution labelled a "Declaration of War."

The national force has been used abroad more than two hundred times since 1789, and its use hinted at or threatened by Presidents in secret or public diplomatic messages many more times, but only five "Declarations of War" have been adopted.¹¹ The practice of other nations in this regard is the same. "Declarations" of war are rare; and no nation has issued a "Declaration of War" since the United Nations Charter was adopted in 1945.

8. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

9. ADAMS, *EULOGY ON MADISON* 47 (1836).

10. U.S. CONST. art. I, § 8, cl. 11. See W. REVELY, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981); C. THACH, *CREATION OF THE PRESIDENCY, 1775-89* (1923); C. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1921).

11. J. ROGERS, *WORLD POLICING AND THE CONSTITUTION* 46-47 (1945); A. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER, THE ORIGINS* (1976); Javits, *War Powers Reconsidered*, 64 *FOREIGN AFFAIRS* 130, 140 (1985); *War Powers Legislation: Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59*, before the Senate Comm. on Foreign Relations, 92nd Cong., 1st Sess. 359-79 (1972) (testimony of Senator Goldwater). Senator Javits' solution of the problem is to characterize all Presidential actions since 1789 which do not conform to his model as "unconstitutional."

Nonetheless, the words "declare war" and "declaration of war" remain the focus of uneasy concern in the endless American argument about the war powers of the nation. The War Powers Resolution does not commit this vulgar error in form, but it does so in spirit. Politicians find it all too easy to exploit that concern when wars become unpopular, as all wars do, and escape from the battlefield by denouncing "John Adams' Undeclared War," "Harry Truman's Undeclared War," or "Lyndon Johnson's Undeclared War," as the case may be.

There is no excuse for the survival of this hoary bit of verbal necromancy. Both the text and the context of the Constitution give an obvious substance—indeed a "plain meaning"—to the words "declare war."

With the possible exception of the clause endowing each state with two Senators, no provision of the Constitution is less ambiguous than the paragraphs of Article I Section 8 which state that Congress has power:

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations; and
To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

The language of these paragraphs is peculiar to international law, and can only be understood in the setting of international law. The phrase "to declare war" in the Constitution has a specific meaning in international law. Under international law, force may be used between states both in time of war and in time of peace. All international uses of forces are not "war" in the legal sense of the word, however bloody and extended the conflicts may be. The older treatises on international law generally appeared in two volumes, one devoted to the Law of War, the other to the Law of Peace. A "declaration of war" transforms the relationship between the belligerents into a state of war and challenges the relation of non-participants to the belligerents. The state of war contemplates unlimited hostilities between the belligerents, the internment or expulsion of enemy aliens, the termination of diplomatic relations, the sequestration or even confiscation of enemy property, and the imposition of regulations—censorship, for example—which would be unthinkable in liberal-minded states during peacetime. And it gives rise to thorny and nearly insoluble problems of neutrality which were important factors in the involvement of the United States in a least four wars and a number of diplomatic controversies which approached the point of war.

On the other hand, the permissible international use of force in time of peace, as international law defines peace, stretches across a wide spectrum of situations from "showing the flag" and other kinds of diplomatic warnings to actual hostilities in the exercise of a state's sovereign and inherent

right of self-defense.¹²

The doctrines of international law on the subject of self-defense are reasonably clear cut. The dominant characteristic of such international uses of force in peacetime is that they should be limited and proportional responses to a prior illegal act of a forceful character for which another state is responsible.¹³ Thus if State A violates certain fundamental rights of State B—for example, by sending guerrillas, armed bands, or terrorists from its territory into that of State B in order to assist a rebellion against the government of State B or by failing to prevent such incursions—and diplomacy, arbitration, and other peaceful procedures for curing the breach are unavailing, State B and states which decide to help it are entitled to use whatever force against State A is necessary to cure State A's breach of international law: so much and no more.

In one of the leading cases of this kind, which took place in 1837, the United States had failed to prevent some anti-British enthusiasts assembled on the Niagara River in northern New York from forming armed bands which crossed the river to join an insurrection against British authority in Canada. After remonstrance failed, the British sent a company of soldiers into New York to disperse the "freedom fighters." In the Anglo-American diplomatic correspondence on the subject, still frequently cited, the United States conceded that Britain had the abstract right under international law to do what it did, but should have given the United States more time to eliminate the camps itself. There was no confusion about what was happening. The United States did not suppose that Great Britain was waging general war against it. The British intervention was limited by the nature of the breach of international law it was intended to cure.¹⁴

In an even more famous episode, Great Britain paid the United States a large sum in damages, as established by arbitration, for having failed

12. See BOWETT, *SELF DEFENSE IN INTERNATIONAL LAW* (1958); BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961); N. Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 *YALE J. WORLD PUB. ORD.* 209 (1981); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *ACAD. DROIT INT'L, HAGUE RECEUIL DES COURTS* 455 (1952); N. Rostow, *Nicaragua and the Law of Self Defense*, 12 *YALE J. INT'L L.* (in press).

13. See BRIERLY, *THE LAW OF NATIONS* 405-32 (6th ed. 1963); L. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978); *INTERVENTION IN WORLD POLITICS* (H. Bull ed. 1984); *LAW AND CIVIL WAR IN THE MODERN WORLD* (J. Moore ed. 1974); E. Rostow, *The Politics of Force*, *YEARBOOK OF WORLD AFFAIRS* 38, 46 (1982); O. SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* Ch. 7-11 (1985); J. STONE, *AGGRESSION AND WORLD ORDER* 41-77 (1958).

14. See J. MOORE, *DIGEST OF INTERNATIONAL LAW* 409-14 (1906); H. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 211-36 (1969); R. Jennings, *The Caroline and McLeod Cases*, 32 *AM. J. INT'L L.* 82 (1938).

during the Civil War to prevent the Confederate cruiser *Alabama* from slipping out to sea unarmed from Liverpool where it was being built. The United States repeatedly warned Great Britain that the ship was intended to be used as a commerce raider. Britain agreed that its failure to prevent the escape of the vessel violated its international legal duty to the United States.¹⁵

Another important branch of the law of self-defense in international law concerns assistance to friendly states in putting down riots, insurrections, rebellions, and civil wars, as well as incursions from other states. A state has an absolute right to assist another state if it wishes to do so under such circumstances. Article 51 of the United Nations Charter refers to this right as the right of "collective self-defense" and provides that nothing in the Charter shall impair "the inherent right of individual and collective self-defense." On the other hand, states are absolutely prohibited by international law from assisting rebels against the government of a state, even if hostilities reach the level of actual belligerency, as the *Alabama* episode demonstrates. The civil wars in the Congo and in Nigeria during the sixties were modern applications of the principle. There states were considered free to assist Nigeria in putting down the Biafran secession, and three states did so publicly, but no state was allowed to help Biafra.¹⁶

There have been many comparable applications of the principle of self-defense throughout modern history, involving not only the protection of borders, but the protection of citizens and nationals in danger abroad; the elimination of what a state perceives to be a threat to its national interests, like President Kennedy's limited use of force during the Cuban Missile crisis of 1962;¹⁷ and interventions on humanitarian grounds where organized government has broken down.¹⁸ Israel, for example, had the right under international law to use whatever force was reasonably required to gain the release

15. See PAPERS RELATING TO THE TREATY OF WASHINGTON (1872-73); C. CAMPBELL, *THE TRANSFORMATION OF AMERICAN FOREIGN RELATIONS, 1865-1900* at 25-49 (1976); A. COOK, *THE ALABAMA CLAIMS* (1975); J. DAVIS, *MR. FISH AND THE ALABAMA CLAIMS* (1893).

16. See L. BUCHHEIT, *supra*, note 13; T. FARER, *THE REGULATION OF FOREIGN INTERVENTION IN CIVIL ARMED CONFLICT* (1974); *THE INTERNATIONAL LAW OF CIVIL WAR* (R. Falk ed. 1971); *THE INTERNATIONAL REGULATION OF CIVIL WARS* (E. Luard ed. 1972); J. MOORE, *LAW AND THE INDO-CHINA WAR* (1972), *reviewed in* 82 *YALE L.J.* 829 (1973); E. LEFEVER, *UNCERTAIN MANDATE, POLITICS OF THE U.N. CONGO OPERATION* (1967).

17. WOHLSTETTER & WOHLSTETTER, *CONTROLLING THE RISKS IN CUBA* (1965). See also H. DINERSTEIN, *THE MAKING OF A MISSILE CRISIS 1962* (1976). In his memoir, *THE CUBAN MISSILE CRISIS* (1974), Abram Chayes advances the untenable argument that the American legal position in 1962 was based on the authority of the Organization of American States, not on the right of self defense. A regional organization cannot supersede the Security Council by its own *ipse dixit*, as Article 53 of the United Nations Charter makes clear.

18. See M. MCDUGAL, H. LASSWELL & CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

of its citizens held hostage at Entebbe in 1976, and to attack PLO installations in Lebanon in 1982 and in Tunisia in 1985.¹⁹ The United States had the same right to use force when our Embassy staff was held in Tehran during the Carter Administration, and when citizens were similarly held in Beirut more recently.²⁰

There are many diplomatic episodes, arbitrations, and judicial opinions dealing with the legality of such uses of force under international law. The rule they represent is applied and discussed with striking uniformity at the professional level. This uniformity is hardly surprising, since the rule reflects the principle of the sovereign equality of states on which the system of world order is based.²¹

In addition, the United States like other countries has used force or the threat of force many times in support of its diplomacy, from the visit of Commodore Perry to Japan in 1853 to President Nixon's secret nuclear warnings that induced the Soviet Union not to attack Chinese nuclear installations in 1969. This behavior, too, is accepted as legitimate under international law in times of peace.

How should this wide array of national power to use force internationally, both in times of peace and of war, be exercised under the American Constitution - by Congress, by the President, or by both? Can there be a single rule applicable to situations of such unpredictable diversity, beyond the provision that only Congress can declare war?

II

The outbreak of the second round of the Great European War in 1793 created as many difficult problems for the United States and as much heated disputation about the foreign affairs powers of the President and Congress as the Vietnam War. The United States was embroiled from the beginning. We fought twice in order to protect what we considered our legal rights as neutrals, once on each side - in John Adams' famous "Undeclared War" against France between 1789 and 1800,²² and later against Great Britain in

19. E. Rostow, *Remarks*, PROC. OF THE 77TH ANN. MEETING, AM. SOC'Y. INT'L L.J. 217 (1983).

20. Falk, Editorial Comment, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT'L L. 411 (1980); Fisher, *The Iranian Crisis: Who Should Do What?* 14 AKRON L. REV. 1 (1980); Gross, *The Case Concerning United States Diplomatic & Consular Staff in Tehran: Phase of Provisional Measures*, 74 AM. J. INT'L L. 395 (1980); Grzybowski, *The Regime of Diplomacy & the Tehran Hostages*, 30 INT'L & COMP. L. Q. 42 (1981); E. Rostow, *Rescuing Missions*, AMERICAN SPECTATOR 10 (1980); Note, *The Iranian Hostage Agreement under International and United States Law*, 81 COLUM. L. REV. 822 (1981).

21. E. ROSTOW, *Obtaining Peace*, chapter in DAVID ABSHIRE, Ed., HISTORY AND MODERN STRATEGY: WAR IN AN HISTORICAL PERSPECTIVE (in press).

22. A. SOFAER, *supra* note 11, at ch. 3; DE CONDE, *THE QUASI-WAR* (1962).

the War of 1812, which was formally declared.²³ There was a most controversial Presidential proclamation of neutrality in 1793,²⁴ backed the next year by an equally controversial Neutrality Act, parts of which are still on the statute books.²⁵ And in Jefferson's administration we indulged in a trade embargo which proved to be as futile as every other act of economic warfare and stirred the first cry for secession in the nation's history.²⁶

Out of the crucible of that experience there emerged a workable and consistent division of authority between Congress and the President with regard to the making and execution of foreign policy, including the use of the national force. That division has survived with little change until the present time. It constitutes a pattern of cooperation and rivalry characteristic of all our constitutional arrangements. Its main lines are determined by the nature of things. Only the President can conduct the day to day diplomacy of the nation and command its armed forces. Only Congress can pass laws needed to make conduct criminal,²⁷ appropriate money, or give longer range policy a completely solid footing. As Judge Abraham D. Sofaer concludes in his comprehensive study of the early constitutional development of the war power, the framework of executive-congressional relations achieved during the first eight years of the Constitution "differs more in degree than in kind from the present framework."²⁸ The President has inherent constitutional rights and obligations, Judge Sofaer contends, to use the national force under many circumstances, at least until Congress acts to the contrary, and, absent valid legislative direction to the contrary, may well be considered to be "a sufficient embodiment of the national sovereignty to exercise its rights under the law of nations."²⁹

The controversy over Washington's Neutrality Proclamation of 1793 is a useful point of departure.

France declared war on Great Britain in 1793, initiating a world crisis which did not end until Napoleon was safely ensconced on St. Helena. The United States was bound to France by treaties of perpetual alliance negoti-

23. Declaration of War of 1812, ch. 102, 2 Stat. 755 (1812).

24. C. THOMAS, *AMERICAN NEUTRALITY IN 1793* (1931); C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 105 (1932); *Henfield's Case*, 11 F. Cas. 1099 (D. Pa. 1793) (No. 6360).

25. Neutrality Act of 1794, ch. 50, 1 Stat. 381 (1794).

26. D. MALONE, *JEFFERSON THE PRESIDENT*, Vol. 5, *THE SECOND TERM, 1805-1809*, ch. 15-16 (1974).

27. The Supreme Court has held that there is no federal common law of crimes, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). Story and Jay, among others, had taken a different view. Story in the *United States v. Coolidge*, 25 F. Cas. 619, 619-20 (D. Mass. 1813) (No. 14,857), Jay in presenting *Henfield's Case* to the Grand Jury, *Henfield's Case*, 11 F. Cas. at 1105.

28. A. SOFAER, *supra* note 11, at p. 127.

29. *Id.* at 5.

ated in 1778 by Benjamin Franklin.³⁰ Those treaties were universally (and rightly) regarded in the United States as the rock on which the independence of the nation was founded. Franklin's treaties seemed to require the infant Republic, in the event of war between France and Great Britain after the end of the Revolution, to side with France, protect the French colonies in the Caribbean, and allow France to fit out privateers in the United States, conduct naval war from American ports, and hold consular prize courts in the United States.

Any such course of action by the United States would have been an act of war against Great Britain, entitling Britain to respond with force. In 1793, the United States could easily have been reconquered by Great Britain both from Canada and from the seas. The other frontiers of the nation were held by British or Spanish forces which could readily have attacked or incited Indians to do so. Spain was dubious both about the fact and the example of the American Revolution, and would become Britain's ally in the war with France. The United States had no navy at the time, and little by way of an army. Washington and his cabinet—including both Jefferson and Hamilton—were determined to preserve neutrality despite the treaties with France. They were equally agreed in advising the President not to call Congress into special session, because of the inflamed state of public opinion.³¹

With the passions of the Revolution still very much alive, the country was violently pro-French and anti-British, and the Jeffersonian party made enthusiasm for France and the French Revolution a political principle. As John Marshall commented in his book *Life of Washington*, "by a great proportion of the American people, it was deemed almost criminal to remain unconcerned spectators of a conflict between their ancient enemy and republican France."³²

Some argued that since only Congress could adopt a Declaration of War, only Congress could adopt a Declaration of Neutrality. To their minds, Congress' authority to declare war included every possible facet of the sovereign national power to use force or not to use it: to avoid the apparent obligation of the treaties, or to embrace them heroically.

Hamilton recommended that the President side-step the issue. In his view, Franklin's treaties did not apply because they were defensive in char-

30. Treaty of Alliance, Feb. 6, 1778, United States-France, 8 Stat. 6, T. S. 82; Treaty of Amity and Commerce, Feb. 6, 1778, United States-France, 8 Stat. 12, T. S. 83. See generally S. BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION*, ch. 5 (1956); W. MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1920*, 468-483 (1910).

31. S. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 94-101 (3d ed. 1950).

32. *THE LIFE OF GEORGE WASHINGTON* 256-57 (2nd ed. 1834).

acter and France had declared war on Great Britain. If the President considered this construction too controversial politically, Hamilton advised him not to recognize the revolutionary government in France, nor to receive its Minister, the notorious Citizen Genet, thus suspending the treaty until a better day; or, in any event, to make his interpretation of the treaties a condition of receiving Genet. All sides in the controversy agreed that the President had the sole power of recognizing foreign governments. Jefferson supported the policy of neutrality, although in deference to his pro-French sensibilities the word "neutrality" was avoided in the Proclamation the President finally issued. But Jefferson was offended by the thought that revolutionary America, which had dealt happily with Bourbon France as an ally, might treat republican France as a pariah. If the President decided to receive Genet, Hamilton replied, he should issue the Proclamation on his own authority.³³

Hamilton's exposition of the President's power to act under the circumstances was published after the event in a series of seven newspaper articles, signed Pacificus. They are one of the neglected masterpieces of our literature both about the Constitution and about our foreign policy.³⁴

The Proclamation of Neutrality had two functions, according to Hamilton: (1) to notify the world that the United States was at peace with both belligerents, and intended to respect its international law duties of neutrality towards each; and (2) to warn United States citizens to abstain from acts which would contravene these duties and thus risk dragging the United States into war. The issuance of the Proclamation necessarily rested on the President's opinion that under the circumstances the United States was not bound to execute certain key features of the treaties with France. Does the President have the authority to make such a decision, and act on it, at least in the first instance?

Hamilton's answer is a categorical "yes." The same answer would be generally accepted today. A recent instance of the exercise by a President of his power to act on his own interpretation of a treaty was President Carter's decision that he could exercise the authority of the United States pursuant to its Security Treaty with the Republic of China to terminate that Treaty in accordance with its text on one year's notice.³⁵

33. See, e.g., C. THOMAS, *supra* note 24, at 95; J. FOSTER, *A CENTURY OF AMERICAN DIPLOMACY* 141-59 (1900).

34. *THE WORKS OF ALEXANDER HAMILTON* 432-89 (H. Lodge ed.). The key essays are conveniently available, together with Madison's answer, signed Helvidius, in E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 7-32 (1917).

35. *Goldwater v. Carter*, 617 F.2d 697 (D. C. Cir.) *vacated as non-justiciable with directions to dismiss*, 444 U.S. 996 (1979). See also Gable, *Taiwan Relations Act: Legislative Rerecognition*, 12 VAND. J. TRANSNAT'L L. 511 (1979); Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19

As for the particular problem of neutrality, the constitutional power is joint and several—a concurrent power. Both the President and Congress can proclaim neutrality, each in its respective sphere. Congress' view is necessarily final. But circumstances often make it prudent for the President to act quickly and decisively, and the President's action can affect the situation with which Congress may have to deal later.

A Proclamation of Neutrality, Hamilton pointed out, is a normal and proper act for a government determined to remain at peace. Its principal purpose is *"to prevent the nation's being responsible for acts done by its citizens, without the privity or connivance of the government, in contravention of the principles of neutrality; an object of the greatest moment to a country whose true interest lies in the preservation of peace."*³⁶ Can such a proclamation be issued by the President alone, or does it require an act of Congress? Hamilton's argument for Presidential power goes to the essence of the problem the nation faced: "a correct mind," he wrote, "will discern at once that it can belong neither to the legislative nor judicial department, and therefore of course must belong to the executive."³⁷ The President, not Congress, is charged with conducting the foreign relations of the United States. Congress is not responsible for making or interpreting treaties and is "not naturally that member of government which is to pronounce on the existing condition of the nation with regard to foreign powers or to admonish citizens of their obligations and duties in consequence; still less is it charged with enforcing the observance of those obligations and duties."³⁸ The proclamation of neutrality did not alter the legal status of the nation with regard to the war raging in Europe and on the seas; it simply called attention to the fact that the United States continued to be at peace with both belligerents, a condition only Congress could change. The question could not be submitted to the courts, which have jurisdiction over treaties, to be sure, but only when contending parties bring such matters before them as part of a justiciable controversy. As everyone at the time knew, Washington had asked the Supreme Court for its opinion on the matter, and the Court had refused, on the ground that it was not authorized to issue advisory opinions, but only to decide actual cases or controversies.³⁹ It follows, Hamilton concludes, that since the United States has the power and the duty under international law to make its neutrality clear promptly, and since neither Congress nor the courts can carry out that duty effectively, it must be considered the function of the executive, who conducts the

HARV. INT'L L.J. 931 (1978).

36. THE WORKS OF ALEXANDER HAMILTON, *supra* note 34, at 436 (italics in original).

37. *Id.*

38. *Id.*

39. Letter from Secretary of State Thomas Jefferson to Chief Justice John Jay, (July 18, 1793), and Jay's reply to Jefferson (Aug. 8, 1793), *reprinted in* 3 Johnston, Correspondence and Public Papers of John Jay 486-89 (1891); C. WARREN, *supra* note 24, at 105-11.

foreign relations of the United States; interprets treaties in the first instance in cases where the courts are not competent—that is, between government and government; is the power charged with the execution of the laws, of which treaties form a part; and is Commander-in-Chief of the armed forces.⁴⁰

This “natural and obvious” view of the matter, Hamilton continued, anticipating the magisterial style of some of Marshall’s greatest opinions, is not precluded by the language of the Constitution. The grant of the executive power of the United States to the President in the Constitution is comprehensive; the mention of certain aspects of the executive power in the document does not confine the President’s authority to those enumerated. Under the Constitution, the President has the full executive power of the nation — that is, the powers of the British Crown, subject only to the exceptions and qualifications stated in the instrument. Among those exceptions and qualifications, of course, is the right of Congress “to declare war, and grant letters of marque and reprisal.” “It deserves to be remarked,” Hamilton said, “that as the participation of the Senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general ‘executive power’ vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”⁴¹ Jefferson later expressed the same view that Congress’ war power should be strictly construed as an exception to the President’s executive power.

In the exercise of its power to declare war, Hamilton continued, Congress can and should consider whether the treaties with France put the United States under an obligation to make war. But before Congress acts, the President has the same right of judgment in fulfilling his own obligation to conduct the foreign relations of the country in accordance with its best interests as he perceives them.⁴² Because of the division of the executive power in the Constitution, the authority of Congress and of the President in this regard is concurrent. Congress has the last word, but often under circumstances carefully arranged by the President acting independently. Normally, the procedure adopted to deal with the emergency represents the best judgment of the President and the Congressional leadership as to the most appropriate way to reach the end they both have in mind, taking political reality into account. To make delicate judgments of this kind and importance is the quintessence of the President’s political responsibility as President — his share in the nation’s sovereign prerogative.

To recapitulate Hamilton’s reasoning from the vantage point of mod-

40. THE WORKS OF ALEXANDER HAMILTON, *supra*, note 34, at 437.

41. *Id.* at 437-43.

42. *Id.* at 440-442.

ern constitutional law: Since the nation has all the powers conferred on states by international law, each of those powers must exist somewhere in the government. If they are not within the judicial province, and could not be or have not yet been exercised by Congress, the President may exercise them both in his own right as holder of the executive power and as the embodiment of the residual sovereignty of the United States.⁴³

Hamilton's *Pacificus* papers were so influential that Jefferson, who wavered badly on the issue of neutrality under the pressures of politics, induced an unwilling Madison to reply. Madison's response, signed *Helvidius*, failed in its purpose, although it has remained a persistent dissenting view, and has recently been revived somewhat under the pressure of events.⁴⁴

Hamilton's analysis of the Presidency leads logically to the conclusion that while only Congress can move the nation into a state of "public, notorious, and general war," as that term is known to international law, the President can use the national force under all the other circumstances in which international law acknowledges the right of states to use force in time of peace. While the President alone has authorized most of the two hundred or more international uses of force the United States has undertaken in time of peace, the pattern of practice is by no means so symmetrical. When it is politically possible for a President to do so, he prefers to obtain Congressional support for his military actions before or after the event. No President can forget the outcry against "John Adams' Undeclared War," which helped make Adams a one-term President and killed the Federalist Party.

The irony of the problem of course, is that obtaining congressional support for his actions does not always protect a President against the political storms normally stirred up by war. Poor John Adams had at least four statutes to support his limited maritime war against France. They did him no political good. Later Presidents have had the same experience. As President Lyndon Johnson once remarked about the Vietnam War,

I said early in my Presidency that if I wanted Congress with me on the landing of Vietnam, I'd have to have them with me on the take off. And I did just that. But I failed to reckon with one thing: the parachute. I got them on the takeoff, but a lot of them bailed out before the end of the flight.⁴⁵

43. See, e.g., E. CORWIN, *supra* note 1, at 170-226; L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); A. SOFAER, *supra* note 11, at ch. 2.

44. See CORWIN, *supra* note 1, at 17 (referring to Madison's *Helvidius* papers as a major statement of the ultra-Whig conception of the Presidency).

45. Letter from President Lyndon Johnson to Eugene Rostow (March 25, 1972). See also E. Rostow, *Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 797, 801-03 (1975) (Response to Henkin's article, immediately preceding, at 747).

As Professor Thomas M. Franck has written, "Much of Congressional-presidential jockeying appears to proceed with Snoopy's epigram in mind (which was directed towards the playing of mixed doubles tennis): 'It matters not whether you win or lose, it's how you lays the blame.'"⁴⁶

This fact of American political life is one of the main reasons why the War Powers Resolution is so profoundly misconceived. It purports to require Congressional approval for every international use of the national force. But unless great national issues are at stake, most Congressmen and Senators prefer not to take responsibility for the President's use of the armed forces. It is a political risk they are happy to leave to the President. As Congressmen and Senators have often told me when, as a government official, I solicited their support for the President on the Hill, "The President has to do what has to be done. I want to be re-elected next year."

The constitutional battles of the first generation after 1789 settled the respective roles of Congress and the President with regard to the use of the armed forces in the Hamiltonian mode. Later experience has only filled in the details. Until the War Powers Resolution was passed, the debate over the respective powers of the President and Congress was largely a matter of political rhetoric or ideological advocacy, not constitutional law. Congress' power to "declare" war does not embrace all aspects of the nation's authority to use or threaten to use armed force in international affairs. And it does not mean that the national force can only be used if Congress has first approved the President's action through a declaration of war. In the early case of *Talbot v. Seeman*, dealing with a problem arising out of John Adams' Undeclared War, Chief Justice Marshall welcomed the fact that neither counsel in the case made any such claim.⁴⁷ The Supreme Court commented in a comparable case, *Bas v. Tingy*:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal law . . . [t]he acts of congress have been analyzed to show that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature.⁴⁸

As Professor Franck says, "Since the decision of the Supreme Court in *Bas*

46. Franck, *Constitutional Practice until Vietnam*, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 15, 16 (1984).

47. 5 U.S. (1 Cranch) 1, 28-29 (1801).

48. 4 U.S. (4 Dall.) 37, 43-45 (1800).

v. Tingy in 1800 and in the *Prize* cases in 1862, and up to and including the Vietnam cases of 1971 to 1973, the courts have refused to sustain the proposition that the use of force by the President is unconstitutional except after a formal declaration of war by the Congress."⁴⁹

It is equally settled that it is constitutionally proper—indeed inevitable—that the President can use or threaten to use the armed forces without any action by Congress both in support of his diplomacy and in situations where international law justifies the limited and proportional use of force in times of peace in order to deal with forceful breaches of international law by another state.

President Andrew Johnson did not require an Act of Congress before sending 50,000 hardened troops to the Mexican border in order to help persuade France to withdraw its troops from Mexico at the end of our Civil War.⁵⁰ Nor did President Truman need congressional permission, at a time of great tension with the Soviet Union over Greece and Turkey, before sending the battleship *Missouri* to Turkey with the body of a deceased Turkish Ambassador.⁵¹ For the same reason, President Kennedy acted constitutionally in using a limited amount of force during the Cuban Missile Crisis, and threatening to use a great deal more if necessary, without the comfort of a statute behind him. The President did not seek Congressional action as the crisis approached, but the Congress passed and the President signed a law nonetheless. The statute was hastily drafted, however, and did not cover the situation President Kennedy actually faced, although it does cover the problems President Reagan faced in Grenada and is currently facing in Nicaragua. The Act provides that the United States is determined

(a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere; [and] (b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.⁵²

Thus military actions to preserve the nation's maritime rights, protect its citizens or other nationals abroad, or carry out its treaty obligations, do

49. Franck, *supra*, note 46, at 17.

50. Bancroft, *The French in Mexico and the Monroe Doctrine*, 2 POL. SCI. Q. 30 (1896).

51. D. McLELLAN & D. ANDERSON, *THE STATE DEPARTMENT YEARS 98-101* (1976); M. MILLER, *PLAIN SPEAKING* 242-244 (1973).

52. S. J. Res. 230, Pub. L. No. 87-733, 76 Stat. 697 (1962). See also A. CHAYES, *THE CUBAN MISSILE CRISIS* 10-11 (1974); E. ROSTOW, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833, 839-40 n.12 (1972).

not require Congressional approval, before or after the event. It is characteristic that when Congress passed a Joint Resolution supporting President Wilson's extensive military operations in Mexico in 1914, it did not purport to "authorize" what President Wilson had done. Instead, it stated that the President was "justified" in his use of force in Mexico, and disclaimed any hostility toward the Mexican people or any purpose to make war on them.⁵³

As the Supreme Court remarked in the great case in *In Re Neagle*, the President has the inherent power to use force without the support of a statute not only to enforce "acts of Congress [and] treaties . . . according to their *express* terms, [but also to protect] rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."⁵⁴ This view of the Constitution echoes Chancellor Kent's comments early in the nineteenth century about the scope of the power of the government to deal with the "great interests which relate to this country in its national capacity."⁵⁵

LECTURE II.

III

In the literature of the American Constitution, there has always been a minority view opposing the Hamiltonian gospel sketched in the first lecture. The dissenters, broadly speaking, interpret the foreign affairs powers of the nation in the constitutional spirit of those who opposed the ratification of the 1787 Constitution. Where Hamilton extolled a strong national government, led by a strong President and a strong Congress, the ultra-Whigs argue for a weak national government, a weak President, and a somewhat stronger Congress, but a weak Congress nonetheless, checked and balanced at every turn by the states, the courts, and the people. Constitutionalists of this persuasion fear a strong national government, and above all a strong President, as dictatorship in disguise. With respect to foreign affairs, they fear that a Hamiltonian government could well drag the United States into foreign adventures which do not concern the security of the nation, and convert the ideal bucolic Republic of their dreams, the beacon of enlightenment and the hope of mankind, into just another grubby imperial power.

To people of this persuasion, it seems reasonable to suppose that if the United States were weak, pacifist, and unarmed, the predators of the jungle would fully respect its rights under international law. The constitutional doctrine of the ultra-Whigs fully matches their perception of world affairs.

53. H.R.J. Res. 251, 63d Cong., 2d Sess., 51 CONG. REC. 7076-78 (1914).

54. 135 U.S. 1, 64 (1890).

55. *Ex Parte Yarbrough*, 110 U.S. 651, 666 (1884); 1 KENT'S COMMENTARIES 201.

They read the Constitution with suspicious literalism as a document imposing limitations on government, and rarely granting power. And they are shocked and repelled by the Marshallian mode of constitutional interpretation, which Hamilton anticipated with grace and skill, and particularly by the notion of "inherent" or "implied" powers. The ultra-Whigs exemplify the naive jurisprudence of those who read text without context, and believe that every power of the national government must be grudgingly derived from "specific" words in the Constitution, rather than from the design and purposes of the Constitution as a whole and from its history as an instrument of government.

The fullest flowering of the ultra-Whig view with respect to the foreign affairs powers of the nation, including the war power, occurred during and after the Vietnam War, especially in connection with Congressional efforts to draft legislation which would restrict the President's authority to use the national force.⁵⁶ There were many other manifestations of the ultra-Whig outlook. Congress sought to take advantage of President Lyndon B. Johnson's unpopularity and President Nixon's political weakness by passing a series of statutes which encroached on the President's authority to conduct the foreign relations of the country.⁵⁷ But the successful campaign which achieved the War Powers Resolution in 1973 is by far the most important victory in the Congressional assault on the Presidency since the Vietnam War turned sour.

I should make it clear that I participated in the controversy about the passage of the War Powers Resolution,⁵⁸ and that I am and have been a firm opponent of unlimited Presidential discretion in using the armed forces, and a firm believer in the constitutional pattern of shared power between Congress and the President as it has evolved for nearly two hundred years. The argument of my earlier articles is that the Hamiltonian principle of shared power, which requires cooperation and concurrence between Congress and the President as the exigencies of circumstance permit, cannot be reduced to a simple formula. As Hamilton wrote in *Federalist*

56. R. CLARK, A. EGELAND, JR., & D. SANFORD, *THE WAR POWERS RESOLUTION* (1985) (particularly useful bibliography); W. REVELY, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981); R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* (1983); Tuley, *The War Powers Resolution*, 25 A.F. L. REV. 244 (1985).

57. See, e.g., Balmer, *Use of Conditions in Foreign Relations Legislation*, 7 DEN. J. INT'L L. & POL'Y 197 (1978); Berger, *Tug-of-War Between Congress and the Presidency: Foreign Policy and the Power to Make War*, 16 WASHBURN L.J. 1 (1976); Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605 (1977); Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397 (1977). See generally *Presidential Power* (I & II), 40 LAW & CONTEMP. PROBS. (Spring 1976 & Summer 1976).

58. See *supra* prefatory note, at p. 1.

Paper No. 23, the developments which may endanger the safety of the nation and call for the use or the threat to use the national force are infinitely varied, so that "no constitutional shackles can wisely be imposed on the power to which the care of it is committed."⁵⁹

Since the early seventies, there have been a number of serious and well considered scholarly studies of the constitutional issues,⁶⁰ as well as Judge Abraham D. Sofaer's meticulously careful *War, Foreign Affairs, and Constitutional Power: The Origins*.⁶¹ In order to bring out the intellectual background of the War Powers Act, I thought it might be useful to begin by reviewing a few of the articles of that period published after my 1972 article was written - articles which fairly represent the ultra-Whig view, as well as Professor Franck's important 1977 article, "After the Fall,"⁶² which derives from the same intellectual universe. I shall direct my observations here first to articles by Prof. Charles A. Lofgren, Prof. William Van Alstyne, Prof. Francis D. Wormuth, and Mr. Raoul Berger.⁶³ These writers offer related, but somewhat different hypotheses as restatements of the original intent of the Founding Fathers embodied in the text of the Constitution.

Mr. Berger believes that the Constitution "conferred virtually all of the warmaking powers" upon Congress, leaving the President only the power "to repel 'sudden attacks' on the United States."⁶⁴ Professor Lofgren is more cautious. He says: "[t]aken together, then, the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war."⁶⁵ Lofgren carefully points out that in the cases arising from the undeclared war with France, "none of the Justices explicitly stated that only Congress might wage imperfect war, but that conclusion," he believes, "was clearly implicit in their remarks."⁶⁶ He sums up in these terms: "Evidence from the years immediately following ratification of the Constitution thus cor-

59. A. HAMILTON, J. JAY & J. MADISON, *THE FEDERALIST* 142 (Modern Library ed., 1937).

60. See *supra* notes 56 and 57.

61. (1976).

62. See *supra* note 57.

63. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. OF PA. L. REV. 1 (1972); Berger, *War-Making by the President*, 121 U. OF PA. L. REV. 29 (1972); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623 (1972).

64. Berger, *supra* note 63, 121 U. OF PA. L. REV. 29, 82 (1972).

65. Lofgren, *supra* note 63, at 700.

66. *Id.* at 701.

roborates the conclusion that Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not."⁶⁷

Van Alstyne reaches much the same conclusions as Berger, but with important variations on subsidiary issues. To Van Alstyne, the grant to Congress in Article I of the power "to declare war" includes by implication the power to authorize every possible use of the national force, save to repel attacks on the United States, its armed forces, or its citizens abroad.

In Van Alstyne's view, the lodgment of the power to declare war in Congress forbids the sustained use of armed force by the President in the absence of a prior, affirmative, explicit authorization by Congress. Van Alstyne would permit only one exception to the rule he distills from the text: an interim emergency defense power in the President to resist invasion or repel sudden armed attack until Congress can be convened to decide whether it will sustain or expand the President's defensive effort by specific declaration or, by doing nothing, require the President to disengage our forces from the theater of action.⁶⁸

Berger and Wormuth appear willing to accept the holding in the *Prize* cases allowing Congress to ratify what the President has done in a situation of emergency.⁶⁹ Van Alstyne does not agree. He sums up his analysis in this way:

1. In the absence of a declaration of war by the Congress, the President may not sustain the systematic engagement of military force abroad for any purpose whatever.

2. The interim use of military force solely to repel invasion of the United States or to relieve American citizens from an existing attack is an authorized executive war power granted by the Constitution. That power expires *ex proprio vigore* when the Congress has had reasonable opportunity immediately to convene and to authorize the continuation or enlargement of hostilities by express declaration. i.e., even the constitutional authorization of emergency executive war power of immediate self-defense terminates upon opportunity and failure of Congress to sustain it by express declaration.

3. In the event that the Congress authorizes the initiation, continuation, or enlargement of military hostilities by express

67. *Id.* at 701-702.

68. Van Alstyne, *supra* note 63, at 9.

69. Berger, *supra* note 63, 121 U. OF PA. L. REV. 29, 61-67; Wormuth, *supra* note 63, at 628-629, 699.

declaration, the constitutional initiative of logistical, tactical, and strategic decision in the conduct of those authorized hostilities belongs to the executive.

4. A residual power of review and control is vested in the Congress through its continuing authority over appropriations, levies upon manpower, and its prerogative to modify or to repeal its declaration of war.⁷⁰

Wormuth can accept no advance "delegation" of authority by Congress to the President to determine the occurrence of defined events which, Congress says, require or authorize the use of force.⁷¹ Berger's position is almost the same. But Van Alstyne is willing to allow some small and conservatively construed practical leeway for the necessities of circumstance by way of Congressional delegation to the president of authority to use force in certain contingencies.⁷² It is difficult to see how Berger and Wormuth can justify their purist positions, in view of the fact that since 1792 at least Congress has repeatedly joined its powers to those of the President in supporting the use of force by the President under specified circumstances, e.g., in dealing with Indian raids and other attacks.⁷³

These nuances aside, all three writers assert congruent positions—the President can act only as the agent of Congress in the use of force, except for a short time in narrowly defined emergencies directly affecting the territory or the armed forces of the United States. Some writers of this school go a quarter of an inch further and allow for the possibility—perhaps—that the President might be conceded to possess the authority to rescue citizens in distress abroad: a commonplace right which all nations have under international law and which the President of the United States has asserted and exercised repeatedly ever since the United States became a sovereign nation.

IV

According to the laws of logic, one fact inconsistent with a theory disproves the theory. The hypothesis must be discarded and reformulated in terms which are consistent with the demonstrable evidence.

Much can be said of the related theories of Messrs. Berger, Lofgren, Van Alstyne, and Wormuth as versions of the original intent of the Founding Fathers—their relationship, for example, to the President's autonomous

70. Van Alstyne, *supra* note 63, at 13.

71. Wormuth, *supra* note 63, at 692-703.

72. Van Alstyne, *supra* note 63, at 15-18.

73. See E. Rostow, *supra* note 52, at 851-856, 858-863.

constitutional authority over the conduct of foreign relations, which in troubled times has often involved the use of force or the threat to use it. But one fact looms up as the missing Hamlet of these four articles, a fact which conclusively disproves all their hypotheses at once: the treaty power, and the Founding Fathers' immediate experience with that power in connection with Benjamin Franklin's Treaties with France of 1778.⁷⁴

The contemporary debate about the war powers of the President and of Congress is a response to the bitter experience of Korea and Vietnam. Those wars were fought under the authority of treaties—the United Nations Charter in the case of Korea, and the Charter and the Southeast Asia Collective Defense Treaty in the case of Vietnam.⁷⁵ Without reference to those treaties and to the respective role of the President and of Congress in making, interpreting, applying, and abrogating treaties, the conflicts in Korea and Vietnam would be constitutionally far more difficult to explain. But the treatment of the problem is cursory, at best, in all four of the articles selected for examination here.

Van Alstyne recognizes the issue when he writes

Even assuming a limited power in Congress to shift the determination to embark upon war to the President, under specified conditions expressed in clear and definite guidelines, the transfer of such authority cannot be accomplished by treaty. The House of Representatives' prerequisite consent to this nation's involvement in war was most deliberately required by the declaration of war clause after consideration of several alternatives, including the specific proposed alternative of vesting the power jointly in the Senate and President alone which was itself rejected. As the House does not consent to treaties, manifestly a treaty cannot be among the possible means of delegating its authority. To imply that the constitutional draftsmen could possibly have formulated a document so specific in its precautions against involvement in war while simultaneously creating an enormous loophole of exclusive Senate power to give it away by simple treaty ratification is wholly without logic or evidence.⁷⁶

Van Alstyne's argument is perfectly logical. Like many logical arguments, however, it is destroyed by a page of history.

While the attempt to reconstruct the Founding Fathers' state of mind is always shadowy and intangible work, and "original intent" can never be

74. See *supra* note 30.

75. Signed September 8, 1954, entered into force February 19, 1965, 6 U.S.T. 81 (1955).

76. Van Alstyne, *supra* note 63, at 22.

more than one guiding factor among many in the growth of the law, we can be certain of one feature of the original intent of the Founders: they accepted the possibility that the United States, like every other nation, could if it wished enter into treaties of military alliance. The United States had such an alliance with France, embodied in two treaties, plus a secret annex, a Treaty of Alliance, signed in Paris on February 6, 1778, ratified on May 4, 1778, and abrogated by Act of Congress on July 7, 1798, and a Treaty of Amity and Commerce, signed on February 6, 1778, and ratified on May 4, 1778.⁷⁷ And the Founding Fathers regard the French alliance with gratitude and reverence as a pillar of the Nation's existence. Surely these two related treaties are covered by the provision of Article VI of the Constitution, that "all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land."

For present purposes, two aspects of those treaties are of special importance: (1) the American guaranty of "the present possessions of the Crown of France in America" in Article 11 of the Treaty of Alliance; and (2) the provisions of Articles 21-29 of the Treaty of Amity and Commerce, which France, and many Americans, construed as authorizing France to fit out privateers and establish consular prize courts in American ports, in the event of war between France and Great Britain after the end of our War of Independence.

The debate over the American policy of neutrality adopted in 1793 is a sufficient answer of principle to the argument made by Messrs. Van Alstyne, Berger and Wormuth. Legally, Van Alstyne's argument against military commitments by treaty cannot be admitted. Treaties and statutes are equally the supreme law of the land. Even tax and tariff problems are often handled by treaty, despite the Constitutional requirement that money bills originate in the House of Representatives.

It is however, worth taking the argument a step further. In 1793, President Washington decided not to join France in war with Great Britain under the treaty and to declare our neutrality. Congress acted to the same effect a year later. Suppose, however, that the President's initial decision had gone the other way, and had in turn been duly supported, or not opposed, by Congress. Suppose President Washington had put garrisons and naval forces in the French islands of the Caribbean which were among the French possessions in America we had guaranteed to France "from the present time and forever" under Article 11 of the Treaty of Alliance. Suppose he had convoyed vessels to those islands, and repelled British attacks on the vessels or the islands.

Would it be possible under those circumstances to say that the Presi-

77. See *supra* note 30.

dent could not respond to attacks exactly as if they were "sudden" attacks upon the United States? When through a treaty, or through a joint resolution of the Congress, or both, the United States guarantees the territorial integrity and political independence of an ally, or of another nation, isn't the President duty bound to see to it that the treaty is faithfully executed? Can he take no steps to implement the guaranty, in order to head off a danger that might have to be fulfilled later by war itself, without the prior consent of Congress? Is it Constitutional for a treaty to declare, as Article 5 of the North Atlantic Treaty does, that an armed attack against one or more of the allies shall be considered an attack against them all?⁷⁸ The declaration of the NATO Treaty flies in the face of the supposed constitutional principles the four scholars selected for examination here, and, I should add, Professor Franck as well,⁷⁹ find the original intent of the Founding Fathers. Their version of the Constitution would confine the President's emergency powers to attacks on the territory of the United States. Either the North Atlantic Treaty is unconstitutional, or their version of the original intent is inadequate and erroneous.⁸⁰

The reasoning of Van Alstyne, Berger, Wormuth, Lofgren, and Franck would equally disable the United States from participating in the activities of the United Nations, as the peace-keeping policies adopted by the United Nations during the crises in Korea, the Congo, Greece, and Rhodesia, among others, demonstrate. That organization sometimes authorizes, encourages, or indeed requires the use of coercive measures, including the use of force, both under Article 51 and Chapter VII of the Charter. The ultra-Whig view would forbid such activities under the United Nations Charter and the United Nations Participation Act unless ratified in each case by Congress.⁸¹

Berger notes with apparent approval the activities of Presidents Wilson and Roosevelt before the First and Second World Wars, when they convoyed vessels, and, in President Roosevelt's case, established bases in Greenland, Iceland, and Bermuda, without benefit of a treaty obligation to Britain or France, or a Joint Resolution of the Congress.⁸² Would he equally approve preventive and precautionary steps of this order with regard to the obligations of a treaty?

78. 63 Stat. 2241 (1949).

79. See *supra* note 57.

80. Professor Franck recognizes the problem by contending that the War Powers Resolution is a breach of the international legal obligations of the United States in this regard, requiring the President to call Congress into special session if necessary in order to consider a declaration of war or a joint resolution authorizing hostilities, see *supra* note 57, at 634-637.

81. United Nations Participation Act of 1945 as amended, P.L. 264, 79th Cong., 59 Stat. 619 (1945), 63 Stat. 734 (1949), and 79 Stat. 841 (1965), 22 U.S.C. 287 (1980).

82. Berger, *supra* note 63, 121 U. OF PA. L. REV. 29, 66.

In applying a treaty, there is clearly a spectrum of decisions which can and should be made, from the purely Presidential to the purely Congressional. As the experience of 1793 attests, the President has an independent power to interpret and apply the treaty in the first instance, in the exercise of his share of the national authority to conduct foreign relations, a vital part of the Executive power. That is what the United States does every day, on the President's instructions, in voting at the United Nations. When such decisions involve coercive measures, or other substantive policies, Congress may tacitly accept the President's construction and application of the United Nations Charter, which is a treaty, or overrule it, as it did a few years ago in the case of an embargo on imports from Rhodesia.⁸³ Exactly the same process occurs in the conduct of our affairs at the North Atlantic Council, the International Monetary Fund, and many other multilateral bodies based on treaties, executive agreements made under the authority of treaties or statutes, or purely Presidential executive agreements.

This realistic sense of the wide range of policies and actions which may be involved in carrying out a treaty obligation animates the testimony of Secretary of State Dulles in his exposition of the Southeast Asia Collective Defense Treaty before the Senate Foreign Relations Committee in 1954. Article IV of that treaty provides:

1. Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

2. If, in the opinion of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.

3. It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any territory so designated shall be taken except at the invitation or with the consent of the government

83. *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972).

concerned.⁸⁴

The Treaty, the Secretary said, was based on the inherent right of individual and collective self-defense recognized in Article 51 of the United Nations Charter—a right whose initial exercise is not subject to the prior decision of the Security Council. So far as the United States is concerned, the Treaty includes “the understanding,” in the words of President Eisenhower’s transmittal statement, “that the only armed attack in the treaty area which the United States would regard as necessarily dangerous to our peace and security would be a Communist armed attack.”⁸⁵

With regard to action under Paragraph 1 of Article IV—that directed against “armed attack”—Dulles said:

The agreement of each of the parties to act to meet the common danger ‘in accordance with its constitutional processes’ leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs. There is, of course, a wide range of defensive measures which might be appropriate depending upon the circumstances. Any action which the United States might take would, for course, be in accordance with its constitutional processes.⁸⁶

The term “armed attack” in Paragraph 1 of Article IV is the operative phrase of Article 51 of the United Nations Charter. It is used in a number of other treaties and international documents. By 1954, it had a considerable gloss, and a long history, embracing the support of revolution in Greece from Yugoslavia, Albania, and Bulgaria in the late forties to the attack on Korea.⁸⁷

Berger does not discuss the meaning of the term “constitutional process” in paragraph 1 of article IV: whether the President can act to initiate and conduct hostilities pursuant to the treaty, as President Truman did in Korea; or take preparatory and precautionary measures “short of war” without obtaining prior congressional approval; or whether every step under the treaty, from diplomatic consultation and secret or public warnings to deter an adversary, to the making of military contingency plans, requires prior Congressional assent. Van Alstyne, as was indicated earlier, takes the view that it is constitutionally impossible to consider treaties as a legitimate

84. *Southeast Asia Collective Defense Treaty, Nov. 11, 1954: Hearings on Exec. K, Part 1, before Senate Committee on Foreign Relations, 83rd Cong., 2nd. Sess. 6 (1954).*

85. *Id.* at 1.

86. *Id.* at 4.

87. Reviewed in E. ROSTOW, *THE POLITICS OF FORCE, THE 1982 YEARBOOK OF WORLD AFFAIRS* 38; O. SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* ch. VIII-IX (1985).

basis for authorizing war. He therefore reads the treaty not as empowering the President to undertake the use of force, but as establishing an international contractual obligation which requires the President to call Congress into special session if necessary, and requires Congress to make a declaration of war if it intends to fulfill the treaty commitment by the use of force.⁸⁸

Secretary Dulles' testimony dealt with the full range of possible responses the United States might consider using once the President has determined that "an armed attack" has occurred, thus justifying any country protected by the treaty to exercise its inherent right of individual and collective self-defense under the United Nations Charter. In response to a question from Senator Smith, one of the signers of the treaty, he explained that the obligation under Section 1 of Article IV was substantially the same as that in the North Atlantic Treaty. Secretary Dulles' and Senator Smith's exchange is reported as follows:

Secretary Dulles. You will remember, Senator Smith, the constitutional debate which was evoked in relation to that clause in the North Atlantic Treaty, which said that an attack upon one is an attack upon all. It raised the question as to whether that automatically gave the President powers to exercise so that in the event of an attack upon Norway, for example, he would have exactly the same power as he would have if there was an attack upon New York or Washington.

That matter was very fully debated in the Senate at the time. I had the honor of being a Member of your body at that time and participated in that debate.

Therefore, when I had the responsibility of starting to negotiate treaties in the Pacific, I felt that it would be preferable to adopt the language which was taken from the declaration of President Monroe, and which reflects our oldest and, in a sense, most respected foreign policy, the Monroe Doctrine, where we declared that an intrusion would be dangerous to our peace and security.

Now, that was a formula which I recall that Senator Taft, who opposed the North Atlantic Treaty formula, has said would have been acceptable so far as he was concerned.

It seemed to me that the practical difference between the two from the standpoint of its giving security to the other parties was not appreciable, and that it was better to avoid a formula

88. See *supra* note 63, at 14.

which would reopen the constitutional debate which took place in reference to that provision of the North Atlantic Treaty, so that formula was used in the Philippine Treaty, in the ANZUS Treaties, it has been reproduced now in the Korean Treaty, and been reproduced in this treaty.

I think that the difference practically is not great, but that the present formula does avoid at least a theoretical dispute as to the relative powers of the President and the Congress under these different formulas.

Senator Smith. Well, this particular treaty which we have just signed and the other bilaterals that you have initiated might be said to have the Monroe Doctrine approach, which over a period of a good many years now has been very effective. This approach has accomplished the results that were sought originally by the Monroe Doctrine. We are practically giving a Monroe Doctrine warning here against aggression and we are standing by the votes that we took.

Secretary Dulles. The language used here which has now become, I would say, almost conventional with reference to these treaties, makes perfectly clear the determination of our Nation to react to such an armed attack. It does not attempt to get into the difficult question as to precisely how we act and precisely how the responsibilities are shared between the President and Congress.

But as far as our national determination is concerned, it is expressed here; that is the thing that other countries are concerned with, and the question of our internal procedures is not properly a matter of their concern, and, in fact, none of the countries with whom we have dealt are concerned about the difference in the formula.

Therefore I think it is better to use this language, which does avoid constitutional controversy, which has been used in these other treaties, and which stems from one of our oldest foreign policies, that of the Monroe Doctrine.

In a sense, it is perhaps not quite as automatic as the other, but that would depend on circumstances. It is a clear determination of our national resolve, which I think will adequately serve to deter, if it is possible to deter at all.⁸⁹

89. *The Southeast Asia Collective Defense Treaty: Hearings Before the Senate Committee on Foreign Relations*, 83rd Cong., 2nd Sess. 21, 22 (1954) [hereinafter cited as *Hearings*].

The obligation of the United States in the event of an armed attack within the treaty area, as he made clear, is of course several, and not dependent upon the prior agreement of other members of SEATO, except for the country concerned. That action could take many forms, including the use of mobile striking power against the source of the attack.⁹⁰ Far from repudiating the precedent of President Truman's handling of the Korean war, Secretary Dulles had the following colloquy with Senator Wiley:

The Chairman. Well, in any case, I take it that paragraph 1 of Article IV applies—that part particularly—to meeting the common danger. Would it be in accordance with the constitutional processes?

Secretary Dulles. Yes Sir.

The Chairman. So whether it were the threat mentioned in Section 2 or the common danger resulting from open attack, action could be taken only after consultation with Congress?

Secretary Dulles. Yes Sir.⁹¹

Thus, both the Senator and the Secretary carefully avoided the view that the United States could act under paragraph 1 of Article IV only after a congressional declaration of limited or unlimited war.

As for threats other than "armed attacks," Secretary Dulles testified:

The danger from subversion and indirect aggression is dealt with in paragraph 2 of article IV, which meets this difficult problem more explicitly than any other security treaty we have made. It provides for immediate consultation by the parties whenever any party believes that the integrity of the treaty area is threatened by other than armed attack. The threat may be to the territorial inviolability or integrity, or to the sovereignty or political independence of any party in the treaty area or any other state or territory to which paragraph 1 of the article may from time to time apply. The paragraph contains no obligation beyond consultation, but the purpose of consultation is to agree on measures to be taken for the common defense. In its understanding with reference to article IV, paragraph 1, the United States affirms that in the event of any aggression or armed attack other than Communist aggression it will observe the consultation provisions of article IV, paragraph 2.⁹²

90. Hearings, *supra* note 89, at 13-14.

91. Hearings, *supra* note 89, at 20 (testimony of Secretary Dulles).

92. Hearings, *supra* note 89, at 4 (testimony of Secretary Dulles).

He was repeatedly questioned on the distinction between action under Section 1 and Section 2 of Article 4 of the Treaty.

Senator Smith. Now, referring to Indochina where we are all very much concerned. According to a number of reports, one of the areas mentioned in the protocol, the present territory and jurisdiction of Vietnam, is in danger of falling under Communist domination. If that occurs, due to internal or external pressure, will the treaty involve us in measures to resist Communist control of the area? I think you answered that before, but I would like to get a clear answer as to whether a sudden movement toward Communist domination in South Vietnam would bring this treaty into operation.

Secretary Dulles. Are you referring now to armed attack?

Senator Smith. It would be armed attack; but suppose there were internal pressures—the subversive activity; was that not one of the questions we were trying to include?

Secretary Dulles. Yes, I just was not clear as to whether your question is directed to article IV, paragraph 1, or article IV, paragraph 2.

Senator Smith. Let us consider them both. Suppose there is an armed attack under article IV, paragraph 1. I would think there would be no question in this instance, but if there is subversive activity which is threatening the integrity of South Vietnam—free Vietnam—would we feel that we were called upon under the treaty to give a danger signal and get together with our allies and consider it?

Secretary Dulles. Well, article IV, paragraph 2, contemplates that if that situation arises or threatens, that we should consult together immediately in order to agree on measures which should be taken. That is an obligation for consultation. It is not an obligation for action.

Of course, we are free to and taking measures already, apart from the treaty and before the treaty is enforced to assist in combating subversion in that area.

But we can do much more effectively, I think what needs to be done, if the treaty is in force, and we have procedures for consultation under the treaty as to how to deal with these situations.⁹³

93. Hearings, *supra* note 89, at 25-26 (testimony of Secretary Dulles).

Secretary Dulles developed the idea further in an exchange with Senator Gillette.

Senator Gillette. Mr. Secretary, I have just one question to ask. Referring to article IV again, the first section is clear. It states that each party recognizes an armed attack as threatening all, and agrees to act in meeting the common danger according to its constitutional processes.

But section 2 provides that any similar threat, other than by armed attack will be met by consultation among the parties and agreement as to what action will be taken.

Now, keeping those two things in mind, we come to the concluding paragraph, which states that we only recognize the obligation under section 1 in case of Communist aggression when we will proceed by our constitutional processes.

Now, this is a hypothetical question—very improbably—but one that I should like to have answered. In the event that there is armed attack in this area by other than a Communist country, does that mean that we, as a signatory cannot take any action in case of such armed attack in accordance with our constitutional processes until we have consulted with all the others and obtained agreement as to what we should do?

Secretary Dulles. No sir. In that respect we retain entire control of our own policy, according to our own judgment. If there should be an armed attack which is not a Communist attack, affecting one of the parties to this treaty, the question of what we should do would then be determined by us as a matter of national policy. We would not be obligated under this treaty.

Senator Gillette. May I supplement my question by saying I do not quite see why that follows. We provide by agreement that in case of an armed attack by a Communist country, we shall proceed, as you have just designated, by our constitutional processes, but we specifically provide in this concluding paragraph that if there is an armed attack by any other than a Communist country that we shall first consult with these associates and obtain their agreement before we take any action.

Secretary Dulles. No. I think you have read into that more than it contains.

Senator Gillette. Well, I hope I have.

Secretary Dulles. It does not say that we will only act in agreement or consultation. It does say that in that event we will be willing to consult.

Senator Gillette. No; it says that we will consult under the provisions of article IV, paragraph 2.

Secretary Dulles. Yes Sir.

Senator Gillette. The language does not state that we will be willing to consult but before we take any action we "will" consult under that provision and obtain agreement as to what action shall be taken.

Secretary Dulles. No Sir. It does not say that we will consult before we act. All it says is we will consult.

Senator Gillette. And that may be subsequent to action that we take?

Secretary Dulles. It could be.

Senator Gillette. That we take independently?

Secretary Dulles. As you say, it is quite unlikely as a practical matter that we would act first, because as I indicated unless the armed attack is of Communist origin, it is difficult to say truthfully that it seriously affects the security of the United States. If communism throws aside all restraints and goes in for armed attack, then I think we can reasonably conclude that it is starting on a course of action which is directly aimed at the United States, that we are the target. We could not say that truthfully in the event that there is an armed attack which occurred between two of the parties to this treaty, which would not be of Communist origin. That would not prove that there was any design against the United States. Therefore, we do not assume the same commitments in that respect.

We do say that we will consult. We do not say that we will consult prior to any action. We merely say we will consult, period.⁹⁴

There is thus no possible way to assert, as many do, that the obligations of the treaty could be carried out, so far as the Senate was concerned, only by a vote of the entire Congress. Both the Senators and the Secretary preserved the full range of possibilities implicit in past practice, including the precedent of President Truman's pattern of action in Korea.

As Senator Cooper points out in his memorable statement of Individual Views with respect to the Javits bill, one of the ancestors of the War Powers Resolution, there is no basis in constitutional usage for declaring

94. Hearings, *supra* note 89, at 35-36 (testimony of Secretary Dulles).

the Korean war unconstitutional.⁹⁵ Cooper wished to clarify the point by statute, if he could, by requiring congressional action to justify the use of force in behalf of treaty obligations "beyond the emergency authority of the executive."⁹⁶ His position fully accepted the authority of the President to take emergency action in carrying out treaty obligations, as President Truman did in the first few hectic days and weeks of the Korean war, not with regard to the territory of the United States, but with regard to the territory covered by our treaty obligation—in that case South Korea, protected by the Charter of the United Nations. In this, Senator Cooper's position rests on the principles which governed President Washington's handling of the neutrality problem in 1793.

In the Vietnam war, both the Presidency and Congress went beyond the formal pattern of Korea. Starting in 1957, the executive branch repeatedly invoked Article IV of the South East Asia Collective Defense Treaty, and characterized the activities of North Vietnam against South Vietnam as "deliberate aggression," invoking Section 1, not Section 2 of Article IV.⁹⁷ So did the Council of the South East Asia Treaty Organization.⁹⁸

95. *Senate Committee on Foreign Relations - War Powers*, S. REP. NO. 606, 92nd Cong., 2nd Sess. 28 (1972), to accompany S. 2956, 92nd Cong., 2nd Sess., 30-32 (1972).

96. *Id.* at 30.

97. Joint Statement of President Eisenhower and President Ngo Dinh Diem, May 11, 1957, 36 DEP'T ST. BULL. 851 (1957) ("Noting that the Republic of Viet-Nam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Viet-Nam would be considered as endangering peace and stability.") State Department Bulletin, May 27, 1957, at 851-852; Message of President Johnson to Congress on May 4, 1965, H.R. DOC. NO. 157, 89th Cong., 1st Sess. (1965) ("We will do whatever must be done to insure the safety of South Vietnam from aggression . . . South Vietnam has been attacked by North Vietnam. . . . Our commitment to South Vietnam . . . rests on solemn treaties, the demands of principle, and the necessities of American security . . . The Southeast Asia Collective Defense Treaty 'committed us to act to meet aggression against South Vietnam.'") State Department Bulletin, July 12, 1965; Address by Secretary Rusk, 53 DEP'T ST. BULL. 50, 53 (1965) ("A cruel and sustained attack by North Viet-Nam upon the people of South Viet-Nam. . . . [The President] has recognized the obligations of this nation under the Southeast Asia Treaty."); Statement of Undersecretary Ball at Meeting of Ministerial Council of the Southeast Asia Treaty Organization on May 3, 1965, 52 DEP'T ST. BULL. 920, 921 (1965) ("The evidence establishes beyond the shadow of a doubt that South Viet-Nam is the victim of deliberate aggression. . . . We have provided assistance for the same reason that we aided Greece and Turkey in 1947, that we fought in Korea, that we joined in forming NATO, and ANZUS, and SEATO. . . .") State Department Bulletin, June 7, 1965.

98. Communique of May 6, 1965, 52 DEP'T ST. BULL. 920, 924 (1965) ("9. The Council reaffirmed its conclusion at Manila a year ago that the defeat of this Communist campaign is essential not only to the security of the Republic of Viet-Nam but to that of Southeast Asia, and would provide convincing proof that Communist expansion by such tactics will not be permitted. Member governments recognized that the state of affairs in Viet-Nam, as described above, constitutes a flagrant challenge to the essential purpose for which they had associated together under the Treaty: to resist aggression.")

Congress fully supported this view of the affair. The Tonkin Gulf Resolution recites that it was passed in accordance with our obligations under the South East Asia Collective Defense Treaty.⁹⁹ And the Supplemental Appropriation Act of May 5, 1965, and other statutes and resolutions, were specifically addressed to the hostilities in Vietnam.¹⁰⁰

As I commented elsewhere, "the unsettled state of doctrine analyzed by Senator Cooper permitted some to indulge in a meaningless gesture of protest against the war in Vietnam by voting for the repeal of the Tonkin Gulf Resolution, while leaving the SEATO Treaty untouched. By accepting Truman's view of the matter—for the moment, at least—they could enjoy the best of both worlds."¹⁰¹

By concentrating here on the treaty-power aspects of the problem I do not mean to suggest that the President does not have some independent constitutional authority to use force, or to threaten its use, in the absence of treaty or advance congressional authorization through Joint Resolutions like the Middle Eastern Resolution of 1957 and 1961.¹⁰² These dimensions of the war powers have been extensively discussed elsewhere.¹⁰³

V

Between the Congress of Vienna and the turn of the twentieth century, the United States was not a major action in world politics. We were a ward of the Eurocentered state system which governed the world in those days - and, on the whole, governed it a great deal more effectively than it has been governed since. The system of order conducted by the Concert of Europe left much to be desired in the realm of justice, although it did take the lead in abolishing slavery. But it did achieve a high degree of international peace, which proved to be a political environment congenial to rapid social progress throughout the world.

Even during this period, the United States pursued an active regional foreign policy which involved the nation in three general wars and many international uses of limited force in times of peace, both in aid of our diplomacy and by way of self-defense. Many of these episodes generated strain between Congress and the Presidency, and some became heated political issues within the United States, and led to the recitation once more of

99. *Southeast Asia Collective Defense Treaty*, Pub. L. 88-408, 78th Stat. 384 (1964).

100. *Senate Committee On Foreign Relations, Background Information Relating To Southeast Asia And Vietnam*, 89th Cong., 1st Sess. 219 (1965) (message of President Lyndon B. Johnson).

101. See *supra* note 52, at 880 n.88.

102. *Middle East Resolution - Promotion of Peace and Stability*, Pub. L. 87-70, 71 Stat. 5 (1957), as amended by Pub. L. 87-195, 75 Stat. 424 (1964).

103. See, e.g., E. Rostow, *supra* note 52.

the constitutional arguments of the Hamiltonians and the ultra-Whigs about the constitutional division of authority over foreign affairs between Congress and the President.

There were five principal areas of international contention for the United States during the century before the United States became a decisive factor in the world balance of power.

A number of problems arose from the twin sacred texts of American foreign policy: George Washington's Farewell Address and John Quincy Adams' Monroe Doctrine. The Farewell Address laid down some practical rules for keeping the infant republic out of Europe's consuming political quarrels during times of relative peace and stability. Washington carefully recognized that periods of extraordinary convulsion in European politics might well require extraordinary remedies, including temporary alliances and participation in war. However, Washington advised the United States to take advantage of its distance from Europe by refraining from participation in the ordinary combinations and collisions of European politics.¹⁰⁴

The obverse of the policy Washington recommended was that Europe should stay out of the political life of the Western Hemisphere. During the period of revolution against Spanish authority in South and Central America after 1815, Britain was concerned about the possibility that Spain, France, and even Austria might attempt to reconquer the former Spanish colonies, and thereby affect the equilibrium of Europe. The British Foreign Minister, George Canning, therefore proposed that Britain and the United States jointly adopt the principle of the Monroe Doctrine. The United States, equally alarmed by the possibility of new European intervention in the Western Hemisphere, but anxious not to be "a cock-boat in the wake of the British man of war," as John Quincy Adams remarked, announced the policy as its own. But the Monroe Doctrine would have been meaningless without the backing of Great Britain, the Queen of the Seas in those far off days.¹⁰⁵

While American popular opinion gave these two eminently pragmatic documents an absolute character they did not have, they were and continue to be a powerful influence in the American mind. Perhaps it would be more accurate to describe them as a powerful part of America's collective unconscious.

104. S. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1936); A. BURT, *THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICAN FROM THE REVOLUTION TO THE ESTABLISHMENT OF PEACE AFTER THE WAR OF 1812* (1940); F. GILBERT, *TO THE FAREWELL ADDRESS* (1961).

105. S. BEMIS, *JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY* (1949); E. MAY, *THE MAKING OF THE MONROE DOCTRINE* (1975); D. PERKINS, *THE MONROE DOCTRINE 1823-1826* (1927).

The third factor in America's nineteenth century foreign policy which led to a good deal of international friction was the doctrine of Manifest Destiny. From the beginning, the American imagination was possessed by the glowing vision of the nation as a great empire stretching from the Atlantic to the Pacific. Manifest Destiny was the driving force in American foreign policy, leading to the acquisition of Spanish Florida, the Louisiana Purchase, the Transcontinental Treaty of 1819, the Oregon Question, Alaska, and the Mexican War. The same impulse led also to the American presence in China and other parts of the Far East from the earliest days of the Republic; the opening of Japan in 1853; the acquisition of Hawaii and later of the Philippines, Guam, and the Marianas.

The fourth key problem of our foreign policy during this period was the gradual disintegration of the Spanish Empire and above all the revolt in Cuba at the end of the nineteenth century.

Finally, the Civil War had critically important international dimensions, which generated both diplomatic and constitutional controversy - the blockade; the long struggle to prevent British and French recognition of the Confederacy; the *Alabama* affair; and the expulsion of the French from Mexico. Constitutionally, President Lincoln's management of the tense early months of the Civil War is the supreme example of the Presidency as an independent branch of the American government. On issue after issue, the President acted alone on the basis of his inherent authority as Chief Executive and Commander-in-Chief of the armed forces; the Congress followed.

The pattern of constitutional practice in the handling of these controversies confirmed and deepened the Hamiltonian construction of the Constitution which took shape during the first thirty-five turbulent years of the nation's experience under the Constitution of 1787. There were areas of foreign policy recognized as exclusively presidential - the recognition of governments, for example, and the conduct of diplomatic business. And there were exclusively congressional areas such as declarations of war and the enactment of other kinds of legislation. For the rest, Corwin commented, "the Constitution, considered only for its affirmative grants of power capable of affecting the issue, is an invitation [to Congress and the President] to struggle for the privilege of directing American foreign policy."¹⁰⁶

Corwin's celebrated remark misses the Constitutional point. It is often read as criticizing the draftsmen of the Constitution for ambiguity and confusion. In my view this is unjustified because sooner or later most aspects of the conduct of foreign affairs involve both legislative and executive deci-

106. Corwin, *supra*, note 1, at 171.

sions. They are therefore the business of both Congress and the President, in a pattern which reflects no sharp lines of constitutional power but hundreds of subtle and supremely political judgments about how the indispensable cooperation between the branches can best be organized under the circumstances of the moment. It would have been foolish of the Founders, as well as impossible, to try to draw the line between executive and legislative power in the field of foreign affairs precisely and in detail.

The flexibility of the constitutional arrangements for making and carrying out the foreign policy of the nation is not peculiar to the field of foreign affairs. As Madison saw from the beginning, the principle of the separation of powers does not mean that the three branches of the government are really separate at all.¹⁰⁷ For the most part their powers are commingled. The branches are not independent but interdependent, and the preservation of the functional boundaries between the legislative and the executive depends as much on the conditioned reflexes of the political system and the political strength of the President as on the occasional rulings of the Supreme Court. For example, Congress can establish a Civil Service Commission, but it would be unthinkable for Congress to interfere with the President's power to remove Cabinet officers and other high officials at will. The one occasion on which Congress sought to do so — the Tenure of Office Act of 1867 — became a constitutional crisis of extreme gravity, leading to the impeachment of Andrew Johnson.¹⁰⁸

As Justice Brandeis once said, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among the departments, to save the people from autocracy."¹⁰⁹

VI

The traditional tension between Congress and the President with respect to the making of foreign policy in general, and the use of the armed forces in particular, was greatly intensified during the Twentieth Century. The cause of this phenomenon was not the malign ambitions of Presidents who dreamed of becoming emperors, or the supine passivity of Congressmen and Senators who abdicated their historic responsibilities. The cause was quite different, and quite simple. The structure of world politics had changed profoundly. The state system governed by the Concert of Europe

107. THE FEDERALIST, Nos. 47, 48 (J. Madison).

108. *Myers v. United States*, 272 U.S. 52, 276 (1926); *Trial Of Andrew Johnson* (Washington 1868); CORWIN, *supra* note 7, at 62-66, 351-356.

109. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

collapsed in 1914. No new Great Power Concert has emerged to replace it - a new grouping with the wisdom and the will to govern world politics as the Concert of Europe did in the century which followed the Congress of Vienna. For the United States, the era of free security was over.

After 1914, we began reluctantly to realize that if our primary national security interest, that in preserving the world balance of power, was to be assured, we should have to take an active part in the process of doing so. There was no alternative. Thus the United States felt impelled to fight in both World Wars in order to prevent Germany from conquering Russia and thereby achieving an unacceptable accumulation of power. In 1949, alarmed by Soviet expansion, we helped to organize NATO in order to prevent the Soviet Union from gaining control over Germany and Western Europe.

The two World Wars and the dissolution of all the European Empires, except for the Russian, caused a profound change in the balance of world power and the magnetic field of world politics. Europe ceased to be the center of the world political universe. The Concert of Europe could no longer manage the system of world public order. Japan and the Soviet Union were factors in world affairs on a new scale. The United States, no longer a peripheral adjunct to the European system, faced altogether new tasks in attempting to protect its national security. In 1823, when Canning suggested the policy now known as the Monroe Doctrine, he said he was calling in the New World to redress the balance of the Old. Since World War II, the United States has had to play Britain's role as arbiter of the world balance of power. No other power could organize and lead the coalitions required to contain the Soviet Union's thrust for dominion, especially because of the history of the nuclear weapon.

This transformation of the American national interest in world politics naturally stimulated an active debate within the United States both about the ends and the means of foreign policy and imposed new strains on the American political system. That debate reached an explosive climax during the early Nineteen-seventies. The bitter and prolonged war in South East Asia dragged on, to the accompaniment of anti-war rioting and disorder of a kind the nation had not experienced since the Draft Riots of the Civil War period and the troubles of Reconstruction. At the same time, the controversy over President Nixon's behavior with respect to the Watergate scandal envenomed the political atmosphere, and produced so strong a movement for the President's impeachment that in August, 1974,—less than two years after his triumphant reelection in 1972—President Nixon resigned.

In this atmosphere of extreme political excitement, a bipartisan major-

ity in Congress succeeded in passing the War Powers Resolution of 1973.¹¹⁰ Its nominal purpose was to assure the people that a vigilant Congress could and would protect the nation against future Vietnams. The political goal of Congress in its perennial war with the President, however, was quite different. That goal was to take advantage of President Nixon's weakness and annex some Presidential territory as its own. For the first time in nearly two hundred years, the Hamiltonian view of the Presidency suffered at least a nominal defeat.

The Resolution is an assertion of Congress' claim to supremacy with regard to the war power, but it does not adopt an extreme form of the ultra-Whig view. It does not say, for example, that the national force can be used by the President only if Congress has first passed a Declaration of War. Nor does it adopt the position that the President's right to use force without the prior approval of Congress is confined to cases of "sudden attack." On the contrary, it acknowledges what history and common sense make obvious—that in the nature of world politics there will be many occasions when the United States, like other nations, will have to use force quickly and decisively in order to protect its security, and that the President is the only possible representative of the nation capable of carrying out such actions. This is the essence of the argument for an "energetic" President which echoes through the Federalist papers.

The War Powers Resolution begins with the statement that its purpose is to fulfill the intent of the framers of the Constitution, and purports to summarize their intent in three propositions: (1) the armed forces should not be introduced into or continued in hostilities or situations where they might well become involved in hostilities without the collective judgment of both the Congress and the President; (2) Congress has the power to pass all laws necessary and proper for carrying into execution the powers of the President; (3) the constitutional powers of the President as Commander in Chief can be exercised by him to introduce the forces into hostilities or into situations where their imminent involvement in hostilities is "clearly indicated by the circumstances" only pursuant to a declaration of war, "specific" statutory authorization, or a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces. It will be noted at once that this attempt at restatement omits any reference to treaties and the role of the Senate.

Section 3 requires the President to "consult" with Congress "in every possible instance" before introducing the armed forces into hostilities or into situations where hostilities are an imminent risk, and also to "consult" regularly with Congress after hostilities have begun until they are

110. *War Powers Resolution of 1973*, Pub. L. 93-148, 87 Stat. 555 (1973) (passed over President Nixon's veto November 7, 1973).

terminated.

“Consultation” between the President and Congress is not a term of constitutional import. The President cannot consult with “Congress.” He can consult only with members of Congress and of course he does so in a nearly continuous political process that occurs in many forms—through meals, telephone calls, poker games, meetings over drinks or more solemn meetings between Congressional leaders and the President at the White House, funerals, weddings, and so on. The Resolution makes no attempt to define the word “consultation,” and none is possible. The injunction requiring the President to “consult” with Congress is meaningless piety. Congress has many vital functions in the political process. Its debates help to lead and crystallize public opinion, the ultimate source of political power in a democracy. Its Committees can serve as the Grand Inquest of the nation, investigating, probing, and proposing. But Congress can *act* only as a collective body, by enacting legislation. The Constitution confers certain legislative powers on Congress, and it can have no other powers. Furthermore, Congress cannot command the President to “consult” with a particular member of Congress any more than it can tell him who his Secretary of State or his most trusted advisers should be. Any such attempt would interfere with the President’s most sensitive executive discretion, that of political leadership.

The fourth section of the Resolution requires the President to report to Congress within forty-eight hours and regularly thereafter whenever he has introduced armed forces into hostilities or into situations risking involvement in hostilities in the absence of a declaration of war. Section 5 is paired with Section 4, and provides that the President shall terminate any use of the armed forces coming under Section 4 within sixty days, unless Congress has declared war or enacted a specific authorization for the use of the armed forces in another form, or extended the sixty-day period to not more than ninety days upon certification by the President that unavoidable military necessity requires an extra thirty days. Subsection (c) of Section 5 provides that where hostilities are being conducted abroad without a declaration of war or a “specific” statutory authorization in another form, Congress may require the President to terminate hostilities and remove the armed forces by concurrent resolution—that is, a resolution not signed by the President or passed over his veto. Subsections (b) and (c) of Section 5—the guillotine provisions—are the heart of the Resolution.

Sections 6 and 7 undertake to establish procedures purporting to bind future sessions of Congress to consider issues arising under Section 5 expeditiously. Section 8 prescribes that Presidential authority to use the armed forces shall not be inferred from any statute unless it “specifically authorizes the introduction of United States armed forces into hostilities, . . . and states that it is intended to constitute ‘specific’ statutory authorization

within the meaning of this joint resolution," and that no treaty shall be deemed to authorize the President to use the armed forces unless it is implemented by legislation of the same tenor. The Section concludes with the ineffable thought that nothing in the Resolution is intended to alter the Constitutional authority of the Congress or the President. This Section, too, with its emphasis on "specificity," is legal nonsense. Where would it leave the reasoning of *Marbury v. Madison* or *McCulloch v. Maryland*?

If the War Powers Resolution were to be carried out literally, it would constitute the most fundamental change in the Constitution ever accomplished—far more drastic in its effects than the shift of authority from the states to the national government which began after the Civil War. It would reduce the Presidency, as Senator Javits had urged, to the status of General George Washington as Commander-in-Chief during the Revolution, subject to the orders of an omnipotent Congress and its officious Committees.¹¹¹ The deterrent influence of American treaties, already weakened by the experience of Vietnam, would decline even further. The United States would be the only country in the world which lacked the capacity to enter into normal treaties and alliances and to conduct secret negotiations where the use of force was in question, and it would be hampered in many others ways in the conduct of its foreign relations.

Enforcing the Resolution would produce all kinds of paradoxes. No President could do what Lincoln did during the Civil War, what Franklin Roosevelt did during the tense period before Pearl Harbor, or what Kennedy did during the Cuban Missile Crisis in 1962. But the legal arrangements for the Vietnam War would have fully satisfied the requirements of the War Powers Resolution of 1973. That war was authorized not only by the United Nations Charter and the Southeast Asia Collective Defense Treaty of 1954, but by the highly "specific" Tonkin Gulf Resolution of 1963 and other explicit acts of Congress as well. Above all, as has been evident in the thirteen years since it was passed, the Resolution would convert almost every serious problem of American foreign policy into an acrid, arid, and irrelevant debate about constitutional power, making our procedures for the conduct of foreign relations even more cumbersome and contentious than they are already.

Constitutional theology is our national passion. Every American heart beats faster when we try to divine the intentions of the Founding Fathers from materials Justice Jackson once said were "almost as enigmatic as the dream Joseph was called upon to interpret for Pharoah." Such exercises are more than lively sport and evidence of our profound commitment to the rule of law. When guided by error or wishful thinking, or when they transcend the permissible limits of construction in interpreting the policies and lan-

111. E. Rostow, *supra* note 52, at 840.

guage of the Constitution, they can do a great deal of harm—witness the Neutrality Act of 1939,¹¹² which helped to convince Hitler that the United States would never help Britain, France, and the Soviet Union, and the War Powers Resolution, which similarly hobbles our diplomacy, makes deterrence less credible, and therefore greatly increases the risk of major war. The methods of the ostrich are of no avail in the realm of foreign affairs.

The War Powers Resolution is in profound conflict with the necessities of governance in the turbulent world of the late twentieth century and with the Presidency which has evolved from the experience of the nation under the Constitution of 1787. It is therefore safe to anticipate that the Hamiltonian conception of the War Powers to which Washington, Lincoln, both Roosevelts, Wilson, and Truman made such notable contributions will prevail as the constitutional norm, and that the War Powers Resolution will become a footnote to history, either through repudiation or desuetude.

Institutional pride may keep Congress from confessing error and repealing the Resolution directly, although a face-saving repeal disguised as a revision is not unthinkable. The courts will almost surely declare the Resolution unconstitutional if an appropriate case should arise. The 1983 ruling of the Supreme Court in *I.N.S. v. Chadha*¹¹³ is fully applicable to the chief operative part of the War Powers Resolution, Section 5. According to that section, the President's authority to use force evaporates unless, within sixty days, Congress votes a Declaration of War or a statute supporting the President's use of force in limited war. Section 5 also allows Congress to terminate a Presidential use of force within the sixty-day period, or at any time in the future (even after it has once voted to support the President's use of force) by Concurrent Resolution, that is, by a Resolution passed by both Houses of Congress but not signed or vetoed by the President.

Section 5 is a classic example of the legislative veto, a modern development in legislation. It purports to reserve to Congress the power to terminate or reverse a President's action under a statute or even to repeal the statute by Concurrent Resolution. The practice originated in 1932, at the dreariest point of the Great Depression, when a doomed Republican President faced a vigorous Democratic Congress already scenting the blood of power. Since then nearly two hundred such statutes have been forced upon protesting Presidents. They authorize both Houses, or one House, or even a

112. Neutrality Act of 1939, 22 U.S.C. § 441 (1982).

113. *I.N.S. v. Chadha*, 462 U.S. 919 (1983); Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. OF INT'L L. 912 (1985); Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808 (1985); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182 (1984); Note, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211 (1985).

Congressional Committee to enact legislative vetoes, often in statutes of the greatest importance, like the War Powers Resolution of 1973.

But *Chadha* ruled that Congressional action can have legislative effect only through Acts or Joint Resolutions fully subject to the President's veto. If Congress cannot terminate a war by passing a Concurrent Resolution, it can hardly do so by not passing such a Resolution.

Section 5 is not separable from the rest of the War Powers Resolution. Without Section 5, the statute is devoid of substance. As was pointed out earlier,¹¹⁴ the provisions about "consultations with Congress" are at best an admonition or a prayer. Even the reporting requirements of Section 4, which seem innocuous at first glance, may well be unconstitutional as a usurpation of the President's discretion in the conduct of foreign relations, and especially of his discretion to use force in situations short of general and unlimited war. Should the President trumpet to the world the substance of a secret warning or signal designed to deter a hostile move by another power? It will normally be easier for a target state to heed a secret warning than a public one. Can Congress require the President to make all such warnings or signals public?

The *Chadha* case has not been popular in the law reviews.¹¹⁵ Professor Tribe's treatment of the case is characteristic of a currently fashionable view among law professors and law journal editors. It appears as Chapter 6 of *Constitutional Choices*.¹¹⁶ Tribe mentions the application of the *Chadha* decision to the War Powers Resolution obliquely, discussing it in a series of footnotes.¹¹⁷

The first sub-heading of Tribe's chapter gives the reader a clue to the thrust of the author's argument: "The Judiciary's Renewed Assertion of Structural Checks on Congressional Innovation." The topic sentence of the first paragraph sounds the theme: "At least since 1976, the Supreme Court has been anything but receptive to Congress' more innovative assertions of authority."¹¹⁸ A page later Tribe identifies such "innovative assertions of authority" by Congress as "the pragmatic accommodations of our times" to

114. See *supra* text accompanying notes 42-55.

115. Elliott, *I.N.S. v. Chadha: the Administrative Constitution, the Constitution, and the Legislative Veto*, Sup. Ct. Rev. 125 (1983); Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. OF INT'L L. 571 (1984); Levitas & Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801 (1984); Note, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493 (1985).

116. L. TRIBE, *CONSTITUTIONAL CHOICES* (1985). The paragraphs which follow borrow a few passages from a review of Professor Tribe's book in the *Washington Post*, December 22, 1985.

117. See, e.g., *id.* at 78 and 316; *Id.* at 79 and 317.

118. *Id.* at 66.

the development of administrative agencies and other extensive "delegations" of legislative authority.¹¹⁹ A page further on, it is suggested that the legislative veto appealed both to those who oppose the executive regulation of American life and industry and to their opponents "who resist deregulation but espouse increased democratic control over those regulations which remain."¹²⁰ We are not told why Presidential and judicial controls over the activities of the executive branch are inadequate or "undemocratic," or at least less "democratic" than Congressional controls, especially when Congressional controls like the legislative veto preclude judicial review.

One of the basic structural features of the Constitution is what Corwin called "the divided initiative" in legislation, the President's capacity to veto bills passed by a simple majority of both Houses, and Congress' capacity to override such vetoes promptly by a two-thirds majority. Wilson thought the President's veto power was his most important prerogative. The veto is certainly one of the most important tools available to the Presidency. Starting long before 1976, the Supreme Court, has gone to great lengths to safeguard both the President's veto and Congress' capacity to override it.¹²¹

It is therefore hardly surprising that many serious students of American politics do not perceive the legislative veto as an "innovative assertion" of democratic legislative authority or "a pragmatic accommodation" to the development of administrative law, but a naked grab for Congressional supremacy intended to transform the American President into a weak Prime Minister. Tribe gingerly concedes that such concern with Congressional encroachment on the President's power might justify the conclusion that some (unspecified) legislative vetoes are unconstitutional. He denies, however, that the issue was raised by *Chadha*, in which the Supreme Court said that all legislative vetoes are unconstitutional.¹²²

The *Chadha* case involved the deportation of an alien by the vote of one House of Congress, reversing a decision in favor of the alien by the Immigration and Naturalization Service. Tribe nowhere tells us flatly whether he considers the Court's decision to be right or wrong, although he clearly prefers the position taken in Justice White's dissent. Apart from his cursory reference to a desire to bring administrative agencies under "democratic" control, he makes no attempt to examine the problem of the legislative veto in its broader setting of history and constitutional policy and of its application to the President's executive authority, particularly in the field of foreign affairs. Instead, he indulges in a few pages of verbal jousting with

119. *Id.* at 67.

120. *Id.* at 68.

121. The Pocket Veto Cases, 279 U.S. 655 (1929); *Wright v. United States*, 302 U.S. 583 (1937); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

122. TRIBE, *supra* note 116, at 74.

the arguments of the Court's opinion in the pyrotechnical style of "Paper Chase." Tribe thinks he has disposed of the logical contradictions and infelicities of the Court's opinion and left the decision in intellectual ruins as a "mystery."¹²³

But has he? Tribe says it is hard to refute the Court's thesis, which he ridicules as the proposition that "a law is a law is a law," and adds that the Court's statement "sheds little light on *why* the veto at issue in *Chadha* was so 'law-like' an action that it 'had' to be deemed legislative."¹²⁴ A few paragraphs later, however, he commends Justice Powell for his contention that the legislative veto provision ruled upon in *Chadha* was a bill of attainder. Tribe says the decision in *Chadha* might be deemed defensible on this ground.¹²⁵

A bill of attainder is punishment imposed by legislation rather than by judicial action. Is Powell's argument therefore really different from Burger's? The vote of the House of Representatives deemed unconstitutional in *Chadha* purported to have effect, in Justice Powell's view, as a legislative punishment. What Powell and Tribe contend in effect is that it would have been an unconstitutional bill of attainder if it had been approved by both Houses and signed by the President, and therefore must be condemned as doubly unconstitutional because it was passed by one House and not signed by the President. Alternatively, Tribe could have said that the bill of attainder issue was not reached because what purported to be "legislation" was passed by one House only, and not signed by the President. In either case, isn't Tribe, like Burger, saying that "a law is a law is a law," for an extremely important reason of constitutional policy, namely, the protection of the President's veto?

I have no difficulty with the Court's decision and opinion in *Chadha*, and believe they will and should survive as a bulwark against legislative encroachment on the executive power—a danger against which Madison warned eloquently in the *Federalist*. I should also contend that *Chadha* most emphatically applies to the problems of the War Powers Act, which purports to deal not only with the acts of the President under statutes and treaties, but also with exercises of his inherent and independent constitutional power as head of the third branch of government.

In holding the War Powers Resolution unconstitutional, the Court may well go beyond the *Chadha* case and deal with features of the Resolution which raise even more fundamental aspects of the separation of powers principle, for example, its effects on the President's power to conduct secret negotiations and on his hitherto unquestioned authority as Commander-in-

123. *Id.* at 75-76.

124. *Id.* at 70.

125. *Id.* at 74.

Chief to bring hostilities to an end, by receiving surrenders or negotiating cease-fire or armistice agreements; and its attempt, recalling the thrust of the Bricker Amendment, to require legislation before treaties can actually be applied as the supreme law of the land.¹²⁶ Even the reporting requirement of the Act, so innocuous at first glance, challenges the President's constitutional discretion in fundamental ways. Suppose there is growing tension in one or another troubled area of the world, and the President moves to protect our interests and at the same time prevent a crisis. He may wish to warn an adversary secretly, or signal our purposes by shifting troops to the theatre of possible conflict; going on alert; or taking a number of other possible measures of comparable import. It is usually easier for the adversarial power to heed such warnings if they are made secretly than if they are trumpeted to the world and thus become a matter of pride and prestige. Should Congress try to control the President's judgment on how to handle so delicate a problem in the conduct of foreign relations? Under the Constitution, can it do so?

If the Resolution is neither repealed nor declared unconstitutional by the Courts, it is bound to be ineffective nonetheless as an influence on the behavior of Presidents. It will be repealed in fact by a force more powerful than Congress or the Supreme Court, the nature of the problems of foreign policy and national security with which the government has to deal. It is striking, for example, that even at the height of the agitation which produced the War Powers Resolution, a Congressional vote rejected the proposal to subject the President's control of the nuclear weapon to the procedures of the Act.¹²⁷ The most extreme of the ultra-Whigs who supported one or another version of the War Powers Resolution conceded that the control of the nuclear weapon has to be Presidential.

At least eleven episodes involving the use of force or the imminent risk of using force occurred during the first decade after the War Powers Resolution was passed. Several more have occurred since then. In each case the Presidents involved (except for President Carter) protested that the Resolution was unconstitutional, but made an effort at least to consult with Congressional leaders and to keep Congress informed about the course of events. In no case did the procedure mandated by the statute prove convenient or appropriate and in no case was it followed. And in each case the Resolution precipitated Congressional protests that the War Powers Resolution was being violated, and even that the President should be

126. Professor Franck characterizes Section 8(a) (2) of the War Powers Resolution as "a stunning and, in international law, perhaps illegal alteration of the conditions" of United States accession to the North Atlantic Treaty and others. Franck *supra*, note 57, at 635. In effect, the Resolution attempts to do what Senator Bricker and his colleagues thought could be done only by Constitutional Amendment, i.e., make all treaties non-self-executing.

127. *Id.* at 608.

impeached.¹²⁸

VII

This review of the controversy over the War Powers Resolution would be incomplete without a comment on Professor Thomas Franck's article in the *American Journal of International Law*, one of the most significant of the recent treatments of the subject.¹²⁹

After recalling the pattern of constitutional practice with regard to the use of the national force much as it is described here, Franck writes: "None would deny that the rules relating to the conduct of our foreign relations have been fundamentally altered or restored to something nearer the classic intent of the Constitution's framers" by the recent assertion of Congressional activism in seeking a larger role in the making of foreign policy and the conduct of foreign relations.¹³⁰ It is one of the purposes of these lectures to puncture that familiar but altogether erroneous myth, a product of the self-deceptions so common during the Vietnam period. Unless we assume that the men who directed and debated the stormy diplomacy of the United States between 1789 and 1825—many of them alumni of the Constitutional Convention of 1787—knew less than we do about the "classic intent" of the Founding Fathers, the myth cannot survive even a cursory examination of the record.

Professor Franck's argument suffers from an even deeper weakness. He allows his analysis and his prescriptions to be shaped by an untenable major premise. We should not be trying to guide the evolution of our constitutional practice closer to what we imagine to be "the classic intent" of the Founding Fathers. Even if we could define that goal - and we cannot - it would not in itself be a relevant or appropriate objective for policy. The policy goals of the Constitution - effective government and democratic responsibility - should of course continue to govern the growth of our constitutional law of foreign relations. That is the essence of the process through which any body of law grows. But the principle does not require us to create a kind of Williamsburg Government, with Tip O'Neill costumed in silk knee britches and a wig. The problem facing the nation is to fashion and refashion the Presidency and Congress as responsible and cooperative institutions capable of carrying out a foreign policy adequate to the security needs of our times and of the foreseeable future. That is an entirely differ-

128. R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* (1983); CLARK, EGELAND & SANFORD, *THE WAR POWERS RESOLUTION* (1985); Tuley, *The War Powers Resolution: A Questionable Solution*, 25 A.F. L. REV. 244 (1985).

129. See Franck, *supra* note 57.

130. *Id.* at 605.

ent matter.

Professor Franck gives his case away when he concedes that only the President can decide when to use the nuclear weapon. He quotes Professor Henkin with approval to the effect that the President's power to use the nuclear weapon must include the power to execute a preemptive nuclear strike when the President and the President alone decides that a major attack on the United States or its vital interests is imminent.¹³¹ If the President has this awesome power, on what conceivable ground can it be claimed that he lacks the inherent constitutional power also to use ordinary conventional force, or to threaten its use, in order to limit, defuse, or resolve ordinary diplomatic confrontations before they become catastrophic? Those who deem orthodoxy a serious problem in answering that question can take appropriate comfort from the fact that Presidents have used force to this end since we first had Presidents in 1789.

Professor Franck refuses to follow this course. Instead, he would make the nuclear weapon an exception to an otherwise implacable rule, and rewrite the War Powers Resolution to that end. In other words, he would revise the Act in order to achieve the goal of having Congress "participate fully" in making all decisions about the use of force except those involving the use of nuclear weapons. At various points in his article, he describes this goal as "healthy" and suggests that it was once the norm of practice, a suggestion conclusively refuted by the evidence he himself marshals.¹³²

In order to accomplish "full participation" by Congress in decision making for situations within the ambit of the War Powers Resolution, Professor Franck proposes a Congressional "consultation," not a vote. The persuasiveness of his conclusion is not enhanced by his assertion that "it is virtually beyond debate that some form of consultation is both legally and politically necessary."¹³³ He recommends amending the War Powers Resolution to meet President Ford's trenchant account of his adventures in attempting to "consult" with Congressional leaders who were scattered at the critical moment between China, Greece, the Middle East, and Mexico. President Ford concluded that in times of crisis, decisiveness is everything—and the constitution plainly puts the responsibility for such decisions on the President of the United States. There are constitutional limits on the Congress which cannot be legislated away.¹³⁴ Professor Franck responds by suggesting that the War Powers Resolution be amended to designate ten congressional leaders as a committee to consult with the President before he

131. *Id.* at 608, 613, 639, 641.

132. *Id.* at 605, 606, 610, 625.

133. *Id.* at 625.

134. *Id.* at 624.

sends the armed forces into situations of conflict.¹³⁵

Franck characterizes the provisions of the War Powers Act about treaties as "a stunning and, in international law, perhaps illegal alteration in the conditions of U.S. accession" to the NATO Treaty, the Rio Pact, and presumably, other security treaties as well.¹³⁶ After a page of discussion, however, he concludes that the provisions of the War Powers Resolution about treaties should be left untouched, although he says that under the Resolution all a President could do in the event that Germany or Japan were attacked would be to call Congress into special session.

This feature of Professor Franck's article is its most startling and dangerous proposal. It is incompatible with the basic thesis of *Perez v. Brownell*¹³⁷ and many other cases that the United States has all the powers possessed by other states under international law — in this instance, the power to make effective treaties of alliance — and it flies in the face of what President Washington did and Alexander Hamilton wrote during and after the Neutrality Crisis of 1793.

Writing in 1977 — that is, before the decision in *Chadha* — Professor Franck concluded that the concurrent resolution and guillotine features of Section 5 of the Resolution should be scrapped as unconstitutional. In their place, he recommends that Congress attempt to codify the circumstances in which the President could use the national force without prior approval by Congress, and then to have those limitations enforced by unenforceable advisory opinions of the courts. The remedy of codification, as long experience has shown, is far worse than the disease, especially because Franck would confine the President's inherent constitutional authority to use force to cases of attack on United States territory, its armed forces, and "perhaps" its citizens abroad. The provisions he suggests for having the courts act as umpire of the revised Act—without the power to order compliance—are certainly unconstitutional under Article III, since they would require the courts to perform non-judicial functions. Even more important, they would further clog the conduct of our foreign relations. Franck reproaches Congress for not insisting on Presidential compliance with the War Powers Resolution, and wants to give the task to the courts. But Congress' refusal thus far to insist on Presidential compliance with the War Powers Resolution has rested in each case on sensible political judgments. This is precisely the kind of judgment the nature of the issues requires. Strict judicial compliance procedures would only make a difficult problem unmanageable.

135. *Id.* at 624, 625.

136. *See supra* note 126.

137. 356 U.S. 44 (1958).

VIII

Once the constitutional aberration of the War Powers Resolution has been digested and forgotten, it will be apparent again that the President and Congress, separately and together, have been entrusted by the Constitution and by its history with sovereign prerogatives in exercising the foreign affairs and war powers of the nation. Those prerogatives have been in uneasy balance for two hundred years. Over a wide range, the President and Congress can exercise their discretion as a matter of their joint or several political judgments in dealing quickly with complex and swiftly moving events on the basis of often fragmentary information. The only constitutional restraints on which the people can rely to secure them from the abuse of such discretion, as Chief Justice Marshall commented in *Gibbons v. Ogden*, is the electoral process itself.¹³⁸

This conclusion applies, I hasten to add, only to the truly political decisions Presidents and Congress make about foreign affairs and the use of the national force. I do not mean to question the constitutional rightness of decisions like *Ex parte Milligan*,¹³⁹ *Youngstown Sheet and Tube*,¹⁴⁰ *Covert*,¹⁴¹ *Kent v. Dulles*,¹⁴² and other cases in which the courts have held that certain decisions purporting to be based on the foreign affairs and war powers of the nation unjustifiably trespassed on the legislative powers of Congress or the rights of citizens. On the contrary, I revere that line of decisions as one of the finest justifications of our claim to be a nation under law.

The real lesson of the War Powers Resolution, I suggest,—and the main lesson of the Vietnam experience of which it is a part—is the primacy of substance over procedure. We try to devise procedural solutions for problems like Vietnam because the leaders of our public opinion have not achieved a national consensus about the kind of foreign policy the safety of the nation requires at this stage of world history. Part of the responsibility rests on our educational institutions which do not often train our youth to understand history, the processes of politics, and the phenomenon of war. Another part represents a failure of leadership. When the war in Vietnam became unpopular, far too many Congressmen were willing to forget their own repeated votes for the war, denounce what they called a Presidential war, and assure their constituents that no President in the future would be able to lure America into war by “stealth.”

Democracy will not survive—and will not deserve to survive—unless it

138. 9 Wheat. 1, 42 (1824).

139. 2 Wall. 2 (1867).

140. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

141. *Reid v. Covert*, 354 U.S. 1 (1957).

142. 357 U.S. 116 (1958).

takes foreign policy seriously, for in that realm, to recall Holmes' vivid phrase, "the price of error is death." We cannot, we must not escape from the demanding but manageable task of dealing with reality by retreating into the insoluble and dangerous realm of myth—myth about the nature of the world, and myth also about the nature of our constitution.